(16,666.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the United States of America and James D. Elliott, United States district attorney for the district of South Dakota, and Joseph McKenna, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the United States district court in the district of South Dakota, wherein The United States of America is defendant in error and Joe Kirby is plaintiff in error, which is a criminal action, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Done in the city of Sioux Falls, in the district of South Dakota, this 25th day of June, 1897.

JOHN E. CARLAND,
District Judge.

Service of the above citation is hereby admitted this 25 day of June, A. D. 1897.

JAMES D. ELLIOTT, *U. S. Att'y.*
S. B. VAN BUSKIRK,
Assist. U. S. Att'y.

[Endorsed:] The United States of America *vs.* Joe Kirby. Citation. Filed June 25th, 1897. O. J. Pendar, clerk.

2 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the district of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between The United States, plaintiff, being the defendant in error herein, and Joe Kirby, defendant, being the plaintiff in error herein, a manifest error hath happened, to the great damage of the said defendant, Joe Kirby, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from date hereof, in said Supreme Court to be then and there held, that, the records and pro-

ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

{ Seal Circuit Court of the United States, District of South Dakota, Sioux Falls. }

OLIVER J. PENDAR,
Clerk of Circuit Court of District of South Dakota.

Allowed by—
JOHN E. CARLAND,
District Judge.

[Endorsed:] The United States of America *vs.* Joe Kirby. Writ of error. Service of the within writ of error admitted this 25 day of June, A. D. 1897. James D. Elliott, U. S. att'y, by S. B. Van Buskirk, assist. U. S. att'y. Filed June 25th, 1897. O. J. Pendar, clerk U. S. district court, district of South Dakota.

Return to Writ.

UNITED STATES OF AMERICA, *District of South Dakota,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the district court, at office, in city of Sioux Falls, this 10th day of August, A. D. 1897.

[Seal U. S Dist. Court, Dist. of South Dakota, Sioux Falls.]

OLIVER J. PENDAR,
Clerk of said Court.

3 In the District Court of the United States within and for the District of South Dakota.

THE UNITED STATES, Plaintiff, *vs.* JOE KIRBY, Defendant. } Southern Division, Docket No. 557.

Be it remembered that on the 30th day of October, A. D. 1896, the following proceedings were had and made of record on folio 264, Journal "C," of said court, in the above-entitled case, to wit:

THE UNITED STATES *vs.* JOE KIRBY. } No. 557. Presentment of Indictment.

Now come the grand jurors into court; their names are called and 18 answer thereto and are present in the box; and they, by their

foreman, present to the court a bill of indictment against said defendant, Joe Kirby, for the crime of receiving Government property. Thereupon, on motion of E. W. Miller, Esq., U. S. att'y, it is ordered by the court that said bill of indictment be received by the court, and that the clerk endorse thereon, "Presented in open court by the foreman of the grand jury in the presence of the grand jury and filed as a record of this court this 30th day of Oct., A. D. 1896," which was done accordingly.

Which said indictment is the following, to wit:

4 District Court of the United States of America for the Southern Division of the District of South Dakota, in the Eighth Judicial Circuit.

At a stated term of the district court of the United States of America for the southern division of the district of South Dakota, begun and held at the city of Sioux Falls, within and for the district and circuit aforesaid, on the third Tuesday of October, in the year of our Lord one thousand eight hundred and ninety-six.

The grand jurors of the United States of America, good and lawful men summoned from the body of the southern division of the district aforesaid to intelligently inquire and true presentment make for said district of South Dakota, in the name and by the authority of the United States of America, upon their oaths do present that Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, late of the county of Brown, in said district, heretofore, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms at Highmore, in the district aforesaid and within the exclusive jurisdiction of this court, feloniously did forcibly break into a post-office of the said United States at Highmore, in said district, and did then and there feloniously steal, take, and carry away from and out of said post office of the said United States at Highmore aforesaid three thousand seven hundred and fifty postage stamps of the said United States of the denomination of two cents and of the value of two cents each, one thousand two hundred and sixty-six postage stamps of the said United States of the denomination of one cent and of the value of one cent each, one hundred and forty post-

5 age stamps of the said United States of the denomination of four cents and of the value of four cents each, two hundred and fifty postage stamps of the said United States of the denomination of five cents and of the value of five cents each, eighty postage stamps of the said United States of the denomination of eight cents and of the value of eight cents each, and United States Treasury notes, national-bank notes, silver certificates, gold certificates, silver, nickle, and copper coins of the said United States and current money of the said United States, a more particular description of which the grand jurors are unable to ascertain, of the value of fifty-eight dollars and nineteen cents, all of which said postage stamps, United States Treasury notes, national-bank notes, silver certificates, gold certificates, silver and nickle and copper coins, cur-

rent money of the United States, so as aforesaid feloniously stolen, taken, and carried away from and out of the said post-office at Highmore aforesaid, was then and there at the time of so being stolen, taken, and carried away the property of the said United States, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that the said Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King were and each of them was duly indicted and convicted of the offense aforesaid at the September term of the said court, held at Deadwood, in said district, in the year of our Lord one thousand eight hundred and ninety-six, and they and each of them were duly sentenced at said September term of said court upon such conviction.

And the grand jurors aforesaid upon their oaths aforesaid do further present that one Joe Kirby, late of the city of Sioux Falls, in the district aforesaid and within the exclusive jurisdiction of this court, on the ninth day of June, in the year of our Lord one
6 thousand eight hundred and ninety-six, with force and arms, at the city of Sioux Falls aforesaid, in the district aforesaid, the postage stamps aforesaid so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America

And the grand jurors aforesaid upon their oaths aforesaid do further present that Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, late of the county of Brown, in said district, heretofore, on the tenth day of April, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at Miller, in the county of Hand, in the district aforesaid and within the exclusive jurisdiction of this court, feloniously did forcibly break into a post-office of the said United States at Miller aforesaid, and did then and there feloniously steal, take, and carry away from and out of said post-office at Miller aforesaid twelve hundred postage stamps of the said United States of the denomination of one cent and of the value of one cent each, seven thousand five hundred postage stamps of said United States of the denomination of two cents and of the value of two cents each, sixty postage stamps of the said United States of the denomination of three cents and of the value of three cents each, seventy postage stamps of the said United States of the denomination of four cents and of the value of four cents each, fifty postage stamps of the said United States of the denomination of five
7 cents and of the value of five cents each, seventy postage stamps of the said United States of the denomination of eight

cents and of the value of eight cents each, twenty-five postage stamps of the said United States of the denomination of fifteen cents and of the value of fifteen cents each, all of which said postage stamps last mentioned then and there so feloniously stolen, taken, and carried from and out of said post-office at Miller aforesaid were then and there in the possession of the postmaster of the said United States at Miller aforesaid, and were then and there the property of the said United States, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that Joe Kirby, late of the city of Sioux Falls, in the district aforesaid, afterwards, to wit, on the fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms at the city of Sioux Falls, in the district aforesaid, the postage stamps last aforesaid mentioned, so as aforesaid feloniously stolen, taken, and carried away feloniously, did receive and have in his possession and conceal, with intent then and there to convert the same to his own use and gain, he, the said Joe Kirby, then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that Frank Parley, alias Thomas J. Wallace;
8 Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, late of the county of Brown, in the district aforesaid, heretofore, to wit, on the seventeenth day of May, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms at Waubay, in the county of Day, in the district aforesaid and within the exclusive jurisdiction of this court, feloniously did forcibly break into a post-office of the said United States at Waubay, in the district aforesaid, and did then and there feloniously steal, take, and carry away from and out of said post-office of the said United States at Waubay aforesaid five thousand and fifty postage stamps of the said United States of the denomination of two cents and of the value of two cents each, five hundred postage stamps of the said United States of the denomination of one cent and of the value of one cent each, and of postage-due stamps of the said United States to the amount and of the value of eight dollars, a more particular description of which is to the jurors aforesaid unknown; all of which said last-mentioned postage stamps then and there, at the time and place last aforesaid, at Waubay aforesaid, then and there being in the possession of the postmaster of the United States at Waubay aforesaid, and then and there the property of the said United States, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that Joe Kirby, late of the city of Sioux Falls, in the

district aforesaid, afterwards, to wit, on the eighteenth day of May, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms at the city of Sioux Falls, in the district
9 aforesaid, the postage stamps last aforesaid so as aforesaid feloniously stolen, taken, and carried away feloniously did receive and have in his possession, with intent to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

E. W. MILLER,
United States Attorney, District of South Dakota.

Names of witnesses sworn and examined before the grand jury: William Tomey, Jeremiah Howe, M. C. Fosness, George H. Jenkins, Hiram Pratt, John Pussey, B. Torrey, William Sunderland, Richard S. Willett, Katie Rochford, William Fenton, C. B. Vocht, B. F. Harrington, E. D. Landon, Melville Richards, Orville Bennett, Phil. S. Campbell, F. P. Stone, J. J. Ryan, A. D. Tinsley, F. L. Rowland.

(Endorsed:) No. 557. The United States *vs.* Joe Kirby. Indictment for receiving Government property. A true bill. S. H. Magner, foreman. Presented in open court by the foreman of the grand jury, in the presence of the grand jury, and filed as a record of this court, this 30th day of Oct., A. D. 1896. C. E. Mellette, clerk. E W. Miller, U. S. attorney, district of South Dakota.

10 And afterwards, to wit, on the 31st day of October, A. D. 1896, the following proceedings were had and made of record in said court, on folio 275, Journal "C" thereof, in words and figures the following, to wit:

THE UNITED STATES
vs.
JOE KIRBY. } No. 557. Arraignment.

Now comes said defendant, with his attorney, F. R. Aikens, and the assistant U. S. attorney moves his arraignment. Thereupon said defendant, by his attorney, waives the reading of the indictment in open court and to such arraignment asks time until 2 p. m. Nov. 2 to enter his plea; which is granted by the court.

And afterwards, to wit, on the 2nd day of November, A. D. 1896, the following proceedings were had and made of record on folio 276, Journal "C" of said court, in words and figures the following, to wit:

THE UNITED STATES
vs.
JOE KIRBY. } No. 557. Plea.

Now comes said defendant, with his attorney, F. R. Aikens, and files a demurrer to said indictment. This is taken up and argued by F. R. Aikens for the defendant and S. B. Van Buskirk for the Government, and is overruled by the court; which ruling is excepted to by defendant's attorney. Thereupon defendant enters his plea of not guilty to said indictment.

Which said demurrer is the following, to wit:

11 United States District Court for the Southern Division of the District of South Dakota, in the Eighth Circuit.

THE UNITED STATES, Plaintiff,
vs.
JOSEPH KIRBY, Defendant. } Demurrer to Indictment.

The defendant in the above-entitled action demurs to the indictment therein (in so far as it relates to him) for the following reasons:

I. To the first count: For the reason that it does not state facts sufficient to constitute an offense against the United States.

II. To the second count: For the reason that it does not state facts sufficient to constitute an offense against the United States.

III. To the third count: For the reason that it does not state facts sufficient to constitute an offense against the United States.

IV. To the entire indictment: For the reason that there are two or more distinct offenses attempted to be charged therein and against different parties, to wit, (1) the crime of burglary and larceny against Frank Parley, alias Thomas J. Wallace, Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, at Highmore, on the 7th day of June, 1896; (2) the crime of burglary and larceny against Frank Parley, alias Thomas J. Wallace, Tom Whalen, alias Ex. Baxter, alias John P. Carroll, and Frank King, at Miller, on the 11th day of April, 1896; (3) the crime of burglary and larceny against Frank Parley, alias Thomas J. Wallace, Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, at Waubay, on the 17th day of May, 1896; (4) the crime of receiving stolen property against Joseph Kirby, at Sioux Falls, on the 9th day of June, 1896; (5) the crime of receiving stolen
12 property against Joseph Kirby, at Sioux Falls, on the 10th day of April, 1896, and (6) the crime of receiving stolen property against Joseph Kirby, at Sioux Falls, on the 17th day of May, 1896.

November 2nd, 1896.

DANA R. BAILEY,
H. H. SCHWARTZ, AND
AIKENS, BAILEY & VOORHEES,
Attorneys for Defendant.

Demurrer overruled; exception taken by defendant and allowed by court.

JOHN E. CARLAND, *Judge.*

(Endorsed:) No. 557. The United States *vs.* Joe Kirby. Demurrer. Filed Nov. 2, 1896. C. E. Mellette, clerk.

13 And afterwards, to wit, on the 8th day of June, A. D. 1897, the said entitled case came on for trial before the Honorable John E. Carland, judge presiding, and the officers of said court, and the following proceedings were had and made of record in said court, commencing on folio 446 and continuing on folios 447–450–'2–'4, '5, '6, and 457 of Journal "C" of said court, in words and figures the following, to wit:

APRIL TERM, A. D. 1897,
SIOUX FALLS, TUESDAY, *June 8th*, 1897.

Court convened pursuant to adjournment.

Present: Hon. John E. Carland, judge, and the officers of said court.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

On this day come The United States of America, plaintiff, by James D. Elliott, Esq., attorney for the district of South Dakota, and Stephen B. Van Buskirk, Esq., his assistant, and comes the said defendant, who has been at large on bail since October 31st, 1896, and who is now present in his own proper person and by his attorneys, F. R. Aiken, Esq., and D. R. Bailey, Esq., and on motion of plaintiff, by its attorney, it is ordered by the court that a jury come to try the issue joined.

Now, at this time, the defendant objects to the whole jury returned to this court and does challenge the whole array; which said objections are duly filed, submitted, and by the court denied. Said challenge to the array is denied for the reason that the records of the court show that said defendant has once been tried for the offense charged in the indictment, and said trial resulted in a disagreement of the jury; whereupon, for the trial of said defendant and others charged with crime, the presiding judge of this court did order the clerk and jury commissioner to draw the present
14 panel of jurors from the box from names selected from the body of the southern division of the district of South Dakota, exclusive of the corporate limits of the city of Sioux Falls, this being necessary in order to obtain unprejudiced jurors and to secure a fair and impartial trial.

And thereupon the following were selected for the trial of this cause, to wit, Carl Jensen, William Baier, Christoff Schnaidt, Milo Glass, J. A. Colcord, J. H. Dwyer, Lon Seeley, L. C. Bode, George Hinds, Charles May, John Rice, E. Ferguson, twelve good and lawful men of the southern division of the district aforesaid, duly se-

lected, empanelled, and sworn to try the issue joined and a true verdict render according to the law and the evidence.

The jury being sworn in said cause, counsel for the defendant files a motion to discharge the defendant for the reason that the defendant has already been placed in jeopardy for the offense for which he is now to be tried; whereupon the court denies said motion for the reason that the record of the court shows that the jury on the former trial of the defendant for the offense charged in the first count of the indictment were discharged for the reason that said jury, after being out twenty-four hours, came into court and stated that they were unable to agree, and the court being of the same opinion.

Now, at this time, the defendant, by his counsel, moves the court that no evidence be allowed to be introduced on the ground that the indictment does not state facts sufficient to constitute a public offense, and said motion is denied by the court.

Oliver S. Pendar, B. M. Lester, Madison Haverly, and W. C. French are duly sworn and examined on behalf of the plaintiff.

Time for adjournment having arrived, on motion of the U. S. district attorney, it is ordered that the jury in this case be
15 placed in custody of two sworn officers of this court during the trial of this cause, which is done accordingly, and further proceedings are postponed until the opening of court tomorrow morning.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

WEDNESDAY, *June 9th*, 1897.

This day comes the parties to this cause, by their respective attorneys; also the jury heretofore empanelled and sworn, in charge of the bailiffs; the defendant is present in his own proper person, and the trial proceeds.

William Toomey, Otto Scherzer, M. L. English, Ben. Hoover, J. H. Howe, L. S. Tyler, W. G. Nicolai, M. C. Fosnes, S. B. Van Buskirk, George H. Jenkins, E. G. Leech are duly sworn and examined on behalf of the plaintiff. Basha Smith is sworn on behalf of the plaintiff, but not examined. J. M. O'Neill and D. B. Thayer are duly sworn and examined on behalf of the plaintiff.

Here the plaintiff rests.

Now, at this time, the defendant, by his counsel, moves the court to instruct the jury, advising them to acquit this defendant for the reasons:

First. That the indictment does not state facts sufficient to constitute a public offense against the United States.

Second. That there is not sufficient evidence in this case that would warrant the jury in returning a verdict of guilty.

Which said motion is denied by the court.

Now, the time for adjournment having arrived and the
16 trial of this cause not being completed, further proceedings are postponed until tomorrow morning, at ten o'clock.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

THURSDAY, *June 10th*, 1897.

This day again come the parties to this cause, by their respective attorneys; also the jury heretofore empanelled and sworn, in charge of the bailiffs; the defendant is present in his own proper person, and the trial proceeds.

Now, the defendant rests, not introducing any testimony herein.

And here both sides rest.

And the said jury, after hearing the evidence and argument of counsel and receiving the charge of the court, retired at four o'clock in the afternoon to consider of their verdict, in custody of bailiffs for the purpose especially sworn.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

FRIDAY, *June 11th*, 1897.

Now, at five o'clock in the afternoon of this day, the respective attorneys for each party to this cause being present and consenting and the jury requesting same in writing, which said request is the following, to wit:

To the Honorable Judge Carland:

The jury in the case of The United States *vs.* Joe Kirby asks that you grant them the rehearing of the evidence of Post-office Inspector Fosnes and Van Buskirk and further instructions as
17 to what constitutes a felony as to holding or having in possession stolen property, and whether they can find the party guilty of part of the charges in the indictment without finding him guilty of all.

JOSEPH A. COLCORD, *Foreman.*

Ordered that the jury come into court, and they come the defendant is present in his own proper person, and, said defendant consenting, the stenographer's notes of testimony of the witnesses M. C. Fosnes and S. B. Van Buskirk, taken upon the trial of this cause, is read in open court for the benefit of the jury, and at the request of the jury the court gives further instructions, and they again retire at fifteen minutes after six o'clock in the afternoon to further consider of their verdict in charge of the sworn bailiffs.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

SATURDAY, *June 12th*, 1897.

And now come the jury in the above entitled case into open court; the defendant is present in his own proper person, with his attorneys, and the said jury return the following verdict, to wit:

We, the jury in the case of The United States against Joe Kirby, defendant, find the defendant, Joe Kirby, guilty of having in his possession stolen property belonging to the United States, as claimed in the indictment, knowing them to be such.

And the jury being polled on the request of the defendant's attorneys, on each juror being inquired of if it was his verdict eleven answered in the affirmative and one answered in the negative.

Whereupon the court ordered the jury to retire to consider
18 further of their verdict, and they retire in custody of the sworn bailiffs.

And after a short time said jury returned into court and in the presence of the defendant, in his own proper person, and his attorneys, return the following verdict, to wit:

We, the jury, in the case of The United States against Joseph Kirby, find the defendant guilty as charged in the first count of the indictment.

And the said jury being polled on the request of the defendant's attorneys, each juror on being inquired of if it was his verdict answered in the affirmative.

Whereupon, by order of the court, the jury was discharged from the further consideration of the case, and the date for pronouncing sentence on the defendant herein is fixed for Monday, June 21st, 1897, at the opening of court.

And afterwards, to wit, on the 21st day of June, A. D. 1897, the following proceedings were had and entered of record on folio 470, Journal "C" of said court, in words and figures the following, to wit:

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day come the parties to this cause, by their respective attorneys; the defendant is present in his own proper person, and this being the day fixed by the court for pronouncing judgment and sentence upon this defendant, upon the request of said defendant—

It is ordered that the time for pronouncing judgment and sentence in this case be, and the same is hereby, postponed until tomorrow morning at ten o'clock.

19 And afterwards, to wit, on the 22nd day of June, A. D. 1897, the following, among other, proceedings were had and done and entered of record on folio 471, Journal "C" of said court; which said proceedings are in words and figures the following, to wit:

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

Comes the parties to this cause, by their respective attorneys; the defendant is present in his own proper person, and now the said defendant, by his counsel, files and submits, with the permission of the

court, a motion in arrest of judgment, and the same is duly argued by counsel, and before the said argument is completed the same is continued until tomorrow morning at ten o'clock, to which time the court continues the date of pronouncing sentence upon said defendant.

And afterwards, to wit, on the 23rd day of June, A. D. 1897, the following, among other, proceedings were had and done and entered of record on folio 473, Journal "C" of said court; which said proceedings are in words and figures the following, to wit:

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

Come the parties to this cause, by their respective attorneys; the defendant is present in his own proper person, and now the argument of said defendant's motion in arrest of judgment proceeds as follows:

Now, on motion of the United States district attorney, it is ordered that paragraph seven contained in said motion in arrest of judgment be stricken out; to which order the defendant then and there excepts; which exception is allowed by the court; and said motion is further argued by counsel, and before the same is completed further hearing thereof is continued until Friday, June 25th, 1897, at ten o'clock in the forenoon; to which time the court continues the date of pronouncing sentence upon said defendant.

And afterwards, to wit, on the 25th day of June, A. D. 1897, the following, among other, proceedings were had and done and entered of record on folios 475 and 476, Journal "C" of said court; which said proceedings are in words and figures the following, to wit:

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

Comes the parties to this cause, by their respective attorneys; the defendant is present in his own proper person, and now the argument of defendant's motion in arrest of judgment proceeds, and at the request of the defendant a continuance thereof is taken until two o'clock this afternoon.

Now, at two o'clock p. m. this day, again comes the parties to this cause, by their respective attorneys; the defendant is present in his own proper person, and the argument of the defendant's motion in arrest of judgment proceeds, and upon said motion being duly submitted to the court, together with proofs, and after full consideration thereof, it is by the court ordered that said defendant's motion in arrest of judgment be, and the same is hereby, denied; to which ruling the defendant then and there excepted, which exception is allowed by the court.

And afterwards, to wit, on the same day, the sentence of the court is pronounced upon said defendant and entered of record on folios 476 and 477, Journal "C" of said court; which said sentence is in words and figures the following, to wit:

21 THE UNITED STATES, Plaintiff, } Southern Division,
vs. Docket No. 557.
JOE KIRBY, Defendant. }

Now, on this the 25th day of June, A. D. 1897, the United States district attorney and the above-named defendant, Joe Kirby, with his counsel, came into court, and this being the day fixed by the court for pronouncing judgment upon the conviction of the said defendant of the crime of having, on the 9th day of June, A. D. 1896, at Sioux Falls, in said district, feloniously received and had in his possession certain postage stamps, the property of the said United States, of the value of one hundred dollars and fifty cents, with intent then and there feloniously to convert the same to his own use and gain, then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away from and out of the post-office of the said United States at Highmore, in said district, as charged in the indictment, the said defendant is now asked by the court if he has any legal cause to show why the judgment of the law upon said conviction should not be pronounced against him, and the said defendant now answers that he has no cause to show further than he has already shown, and the said defendant having been duly convicted of the crime of having feloniously had and received into his possession on the 9th day of June, A. D. 1896, at Sioux Falls aforesaid the postage stamps aforesaid, with intent then and there feloniously to convert the same to his own use and gain, then and there well knowing the same to have been theretofore feloniously stolen, taken, and carried away as aforesaid, in said United States district court for the district of South Dakota.

It is now by the court here considered, ordered, and ad-
22 judged, and the sentence of the court is, that you, Joe Kirby, be imprisoned at hard labor in the penitentiary at Sioux Falls, in the county of Minnehaha, in said State of South Dakota, for and during the term or period of two years, there to be kept, fed, and clothed according to the laws regulating said prison, and while so confined you shall be exclusively under the control of the officer or officers having lawful charge of said prison, and that you stand committed to said penitentiary until this sentence be complied with.

The defendant in the above-entitled case filed his challenge and objection to the whole jury returned to this court on the 8th day of June, A. D. 1897, which is hereunto annexed; and also filed on the 8th day of June, A. D. 1897, his motion to dismiss this action on account of former jeopardy, which is hereunto annexed; and also filed on the 22nd day of June, A. D. 1897, his motion on arrest of judgment, which is hereunto annexed; and also filed on the 28th day of June, A. D. 1897, his exception to the ruling of the court on motion in arrest of judgment, which is hereunto annexed.

The order of the court for the drawing of the petit jurors, which constituted the whole jury to which the defendant filed his said challenge to array, was filed on the 3rd day of May, A. D. 1897, and entered of record in said court; which said order for the drawing of said petit jurors is in wortds and figures the following, to wit:

23 In the United States District Court within and for the District of South Dakota.

In the Matter of Drawing and Summoning Petit Jurors for Adjourned April Term, A. D. 1897.

Order.

To the clerk of the United States circuit court for said district and H. J. Davenport, jury commissioner of said district:

For the purpose of securing a fair and impartial trial of the causes set for trial on the 25th day of May, A. D. 1897, in the above-entitled court, and in pursuance of section 802, R. S. U. S., you are hereby ordered and directed to draw and summon sixty persons from the body of the southern division of the district of South Dakota, excluding the territory within the incorporated limits of the city of Sioux Falls, within the county of Minnehaha and district of South Dakota, and in accordance with the act of Congress defining the manner of drawing jurors approved June 30th, 1879, as amended and modified by the act of Congress approved November 3rd, 1893, to serve as petit jurors at the ensuing adjourned April term, A. D. 1897, of said district court, to be and appear before said district court, to be holden in the rooms used for holding the sessions of the United States courts, in the city of Sioux Falls, in said district, on Tuesday, the 25th day of May, A. D. 1897, at ten o'clock a. m. of said date, and bid them not to depart without leave of court first obtained, and for this purpose it is ordered that a venire issue forthwith after the said drawing shall have taken place and a report thereof duly filed.

By the court:

JOHN E. CARLAND, *Judge.*

24 (Endorsed:) District court. *In re* order for petit jurors. Adjourned April term, 1897, adj. to May 25, '97. Filed May 3, 1897. Oliver S. Pendar, clerk.

Said defendant's challenge to the whole jury, with the court's finding and ruling endorsed thereon, filed as aforesaid, is the following, to wit:

25 UNITED STATES OF AMERICA, }
State of South Dakota. }

In District Court, Southern Division.

UNITED STATES }
vs. } Challenge to Array.
JOE KIRBY. }

Now cometh the said Joe Kirby in his own proper person and by his attorneys, F. R. Aikens, Esq., and D. R. Bailey, Esq., and now at this time said indictment having been called for trial, doth object *the* the whole jury returned to this court and doth challenge the whole array for the following reasons:

I. The said jury is not an impartial jury of the State and district wherein the crime charged in the indictment is alleged to have been committed, according to art. 6 of the amendments to the Constitution of the United States.

II. That said jury is not a jury from the vicinage wherein the crime is alleged to have been committed, and that O. S. Pendar, the clerk of this court and likewise the clerk of the circuit court for this district, together with H. J. Davenport, jury commissioner, did willfully and wrongfully omit from said jury, and did so willfully and wrongfully refuse to place *the* among the names in the jury box from whence said jury was drawn, the names of any persons residing in the city of Sioux Falls, being the city in which this court is now held and in which the said defendant has for ten years and upward resided, and that thereby if said jury is allowed to sit this defendant will be deprived of his constitutional right of trial by jury.

III. That there are in the city of Sioux Falls about two thousand persons possessing the qualifications required by law for United States grand and petit jurors, and that no person so residing
26 in said city has been selected upon said jury, but were willfully, wrongfully, and intentionally omitted therefrom, and said jury selected from outside Sioux Falls for the express purpose and with the view of procuring a jury adverse to this defendant.

IV. That the court had no power to order or receive a jury drawn in the manner and way and for the purpose aforesaid, all of which in the foregoing set forth your defendant is ready to verify.

Wherefore he asks the court that said venire be quashed and set aside, and that said jury be held not competent to serve, and that they be discharged from attendance upon this court.

FRANK R. AIKENS &
D. R. BAILEY,
Defendant's Attorneys.

Motion denied, for the reason that the defendant, as shown by the records of this court, was once tried by jury at the present term on the present indictment and the jury could not agree, and that said records further show that the presiding judge of this court ordered the present panel of jurors to be drawn by the clerk and jury commissioner from the box from names selected from the body of the

southern division of the district of South Dakota, excluding the corporate limits of the city of Sioux Falls, in order that unprejudiced jurors might be obtained and a fair and impartial trial had. Def't excepted, and exception allowed.

JOHN E. CARLAND, *Judge.*

(Endorsed:) The United States of America *vs.* Joe Kirby. Challenge to array. Filed June 8th, 1897. O. S. Pendar, clerk.

27 Said defendant's motion to dismiss action on account of former jeopardy, with the court's findings endorsed thereon, filed as aforesaid, is the following, to wit:

UNITED STATES OF AMERICA, } ss:
District of South Dakota, }

In District Court Thereof.

UNITED STATES OF AMERICA }
vs.
JOE KIRBY. }

Now comes the defendant, Joe Kirby, in the above-entitled action in his own proper person and by his attorneys, Frank R. Aikens, Esq., and D. R. Bailey, Esq., and respectfully states and shows to the court:

I. That on the 19th day of April, 1897, at a regular term of this court held in the city of Sioux Falls, in said district, upon the plea of not guilty theretofore entered by this defendant to the indictment returned against him in this action, being the same indictment upon which it is sought by the prosecution to place this defendant again upon trial, a jury were by this court duly and legally impaneled, sworn, and charged according to law to try all of said issues and true deliverance make.

II. That thereupon said indictment was read to said jury so sworn, impanelled, and charged as aforesaid; thereupon the prosecution did introduce evidence before this court and said jury with a view and for the purpose of sustaining the charges contained in said indictment.

III. That on the 21st day of April, 1897, and upon the prosecution in this case having rested, after having introduced such evidence as aforesaid, this court ruled and held as a matter of law that the prosecution had not proved facts sufficient to entitle the
28 jury to return a verdict other than not guilty as to that portion of said indictment designated by the prosecution as the second and third counts in said indictment and designated by the defendant as the third, fourth, fifth, and sixth counts in this indictment, being that portion of said indictment in which reference is made to the Miller and Wanbay post-offices.

Thereupon the court did render judgment adjudging this defendant not guilty as to the matters and things set forth in either of the counts and did discharge this defendant without day in regard

thereto, all of which will more fully appear by the records of this court made upon said trial, and that by reason thereof, as to the matters and things aforesaid, this defendant has been placed in *jeopardy* in the charges in each of said counts in said indictment and has upon said trial been duly acquitted and been adjudged not guilty thereof.

IV. That as to the matters and things set forth in that part of said indictment which relates to and which is mentioned as the Highmore post office, being that portion designated by the prosecution as the first count and by the defendant as the first and second counts, this defendant, in addition to the matters and things aforesaid, does further show to this honorable court that on the 22nd day of April, 1897, at 3.30 o'clock p. m., and after all the evidence on the part of the prosecution had been introduced, and the prosecution having rested, the court did thereupon instruct the jury in regard to the law applicable to the case, and thereupon the jury did retire to deliberate and return a verdict in accordance with the law and evidence applicable to the case; and thereafter, on the 23rd day of April, 1897, at 4 o'clock p. m., said jury were by the court, in the absence of this defendant and without his knowledge or consent,
and without good or sufficient cause therefore or any suffi-
29 cient cause whatever, and against the will and desire of this
defendant, discharged from further consideration of said case, and thereby this defendant was in effect found not guilty.

V. That by the reason of the matters and things aforesaid this defendant has been subject for the same offense to be put in *jeopardy* of life and limb, and that to permit this defendant to be again placed on trial on this indictment would be to twice subject him for the same offense to be put in *jeopardy* of life and limb, contrary to art. 5 of the amendments of the Constitution of the United States, and contrary to the force and effect of the statutes in such cases made and provided, all of which this defendant is ready to verify.

Wherefore this defendant moves this honorable court that this action be abated and dismissed, and that he be discharged from custody and held not to further answer in these matters.

D. R. BAILEY,
FRANK R. AIKENS,
Def't's Attorneys.

Motion denied for the reason that the records of this court show that the defendant was once tried on this indictment at the present term, and the jury, after being out twenty-four hours, returned into court and said they were unable to agree upon a verdict, and the court, being of the opinion that said jury could not agree, discharged them from the further consideration of the case, the defendant being at large on bail. Defendant excepted to this ruling, and exception allowed.

JOHN E. CARLAND, *Judge.*

30 (Endorsed:) The United States of America *vs.* Joe Kirby. Motion to dismiss on account of former jeopardy. Filed June 8th, 1897. Oliver S. Pendar, clerk.

Said defendant's motion in arrest of judgment, filed as aforesaid, is the following, to wit:

UNITED STATES OF AMERICA, *District of South Dakota,* } ss:

In District Court Thereof, Southern Division.

UNITED STATES *vs.* JOE KIRBY. } Motion on Arrest of Judgment.

Now comes this defendant, Joe Kirby, in his own proper person and by his attorneys, D. R. Bailey, Esq., and F. R. Aikens, Esq., and respectfully moves the court that no sentence be passed upon the verdict rendered therein, but that judgment in this action be arrested for the following reasons:

I. That the facts stated in the indictment are not sufficient to constitute a cause of action against this defendant or to show that he committed any offense against the laws of the United States.

II. That the special verdict found by the said jury, entered on the minutes of the court, was never vacated and set aside, and that said special verdict would not sustain any judgment sentence against the defendant, but would entitle him to his discharge.

III. That said special verdict having been entered on the minutes of the court, the court had no jurisdiction to allow said jury
31 to again retire and deliberate upon the case.

IV. That said verdict is against and finds one Joseph Kirby guilty and does not pass upon this defendant, Joe Kirby, in any manner.

V. That the plea- of former acquit-al and former jeopardy interposed by this defendant upon said trial were not by the prosecution denied and no issue taken thereon, either of law or fact, and that thereby the truth of said plea was admitted.

VI. That said plea- of former acquit-al and former jeopardy constitute a complete bar to the trial of the present case.

VII. That the affidavits of the jurors conclusively show that the general verdict, as announced by the foreman and entered on the minutes of this court, does not express the findings of fact as agreed upon by the jury in the jury-room, but that the same was so announced and received under a mistake.

JOE KIRBY, *Defendant.*

D. R. BAILEY &
FRANK R. AIKENS,
Attorneys & of Counsel.

(Endorsed:) The United States of America *vs.* Joe Kirby. Motion in arrest of judgment. Filed June 22nd, 1897. O. S. Pendar, clerk. (Endorsed on outside cover:) Record roll. Filed June 25th, 1897. O. S. Pendar, clerk.

Said exception, filed as aforesaid, is the following, to wit:

UNITED STATES OF AMERICA, } ss:
District of South Dakota, }

District Court Thereof, Southern Division.

32 UNITED STATES }
vs.
JOE KIRBY. }

And now, on this 21st day of June, 1897, the defendant having duly presented to the court and filed with the clerk his motion in arrest of judgment, and thereupon the prosecution having moved the court to strike out from said motion in arrest of judgement paragraph seven thereof: *and*

Thereupon the court sustained said motion of the prosecution and did strike out from said motion in arrest of judgement paragraph seven thereof; to which ruling the said defendant then and there duly excepted, and which exception is settled and allowed and made a part of the record in this action.

JOHN E. CARLAND, *Judge.*

And thereupon the court did on June 25th, 1897, deny said motion in arrest of judgment and overrule the same; to which ruling the said defendant then and there duly excepted, and which exception is settled and allowed and made a part of the record in this action.

JOHN E. CARLAND, *Judge.*

(Endorsed:) Filed Jun- 28, 1897. Oliver S. Pendar, clerk.

And on the 22nd day of June, A. D. 1897, being a day of the April, 1897, term of said court and being of the same term at which said case was tried, the defendant's bill of exceptions *are* duly settled, allowed, and signed by the judge before whom the case was tried; which said bill of exceptions is the following, to wit:

33 UNITED STATES OF AMERICA, } ss:
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES }
vs. } ss: Bill of Exceptions.
JOE KIRBY. }

The above-entitled action came on for trial upon the 8th day of June, 1897, the defendant appearing in person and by his attorneys, F. R. Aikens, Esq. and D. R. Bailey, Esq., and the prosecution appearing by J. D. Elliott, Esq., U. S. district attorney, and S. B. Van Buskirk, his deputy. The Hon. J. E. Carland, judge presiding, and the other officers of the court being present, the following were had, to wit:

The indictment from the first thereof down to and only to where the following expression, "And the grand jurors aforesaid upon their oaths aforesaid do further present," is used the third time in said indictment, being that portion thereof which related to the larceny at Highmore post-office, was read to and the jury informed of the plea of the defendant thereto, & defendant placed on trial thereto, being that portion of the indictment denominated by the prosecution the first count therein.

Thereupon the said O. S. Pendar was called and sworn as a witness on behalf of the prosecution, and before any evidence was introduced in said action the defendant made the following objections to the introduction of any testimony under the 1st count of the indictment as follows:

1st exception.

I. That said count which has been read to this defendant and on which he has been arraigned and is now placed on trial does not state facts sufficient to constitute a crime committed by this defendant of which this court had jurisdiction or otherwise.

II. That said count does not inform this defendant, the said Joe Kirby, of the nature and cause of the accusation against him, as required by article six of the amendments to the Constitution of the United States or otherwise, and to require this defendant to
34 proceed to trial upon said count would be to dep-ire him of his liberty or property without due process of law, as provided by article five of the amendments to the Constitution of the United States.

III. That said count is defective and does not charge this defendant with having committed any public offense or crime against the law of the land of which this court has jurisdiction or otherwise.

Which above objections were by the court overruled, and to which ruling the said defendant then and there duly excepted, and which exceptions are hereby settled and allowed.

And thereupon the defendant made the further objection—

2nd exception.

Now cometh Joe Kirby in his own proper person and by his attorneys, F. R. Aikens, Esq., and D. R. Bailey, Esq., and now, at this time and before any evidence hath been introduced in said action, objects to the introduction of any evidence in this action on the part of the prosecution or otherwise, under the second count contained in said indictment, because:

I. That said count which has been read to this defendant and on which he has been arraigned and is now placed on trial does not state facts sufficient to constitute a crime committed by this defendant of which this court has jurisdiction or otherwise.

II. That said count does not inform this defendant, the said Joe Kirby, of the nature and cause of the accusation against him, as required by article six of the amendments to the Constitution of the United States or otherwise, and to require this defendant to proceed to trial upon said count would be to deprive him of his liberty or property without due process of law, as provided
35 by article five of the amendments to the Constitution of the United States.

III. That said count is defective and does not charge this defendant with having committed any public offense or crime against the law of the land or otherwise.

IV. That section two of the act of Congress approved March 3rd, 1875, being an act entitled "An act to punish certain larceny and receivers of stolen property," is unconstitutional and not according to due process of law or the laws of the land, and especially in so far as the same attempts to make the judgment of conviction of the principal felon conclusive evidence in the prosecution against the receiver that the property therein described has been embezzled, stolen, or purloined.

V. That said count is defective and does not purport on its face to accuse the defendant of the commission of any crime of which this court has any jurisdiction or otherwise, but that said count refers to things set forth in other counts in said indictment for substantive matters.

VI. That said count is defective, in that it does not charge the defendant with the commission of any crime of which this court has jurisdiction or otherwise, and in especially that it does not state from whom said stamps or property was by the said defendant received, nor does it allege that said stamps or other property was the property of the United States, at the time this defendant is accused of receiving the same, nor are they alleged to be of any value.

Which above objections were by the court overruled, and to which ruling the said defendant then and there duly excepted, and which exception is hereby settled and allowed.

Thereupon the said O. S. Pendar did testify that he was
36 clerk of this court and had charge of the records and of the records of the September, 1896, term held at Deadwood, S. D., and that said records and files were the original records and files of this court; and—

3rd exception.

Thereupon the prosecution offered in evidence page 23 of the Journal of this court referred to & produced by witness Pendar, as follows:

PLAINTIFF'S EXHIBIT "A," F. R. S.

THE UNITED STATES *vs.* FRANK PARLEY, alias THOMAS J. WALLACE; Tom Whalen alias Ed. Baxter, alias John P. Carroll, and Frank King.	No. 191. Presentment.

Now come the grand jurors into court, their names are called, and sixteen answer thereto and are present in the court, and they, by their foreman, present to the court a bill of indictment against said defendants for the crime of breaking into a United States post-office with intent to commit larceny therein. Thereupon, on motion of E. W. Miller, Esq., U. S. attorney, it is ordered that said bill of indictment be received by the court, and that the clerk endorse

thereon, "Presented in open court by the foreman of the grand jury, in the presence of the grand jury, and filed as a record of this court, this 17th day of September, A. D. 1896," which was done accordingly.

To which offer defendant then & there duly objected for the reason no proper foundation has been laid for it, in that the indictment has not been offered in evidence; which objection is overruled, and to which ruling the said defendant, Joe Kirby, then & there duly excepted, and exception is hereby settled and allowed.

37 4th exception.

Q. asked witness Pendar by U. S. attorney: Have you the indictment? A. Yes; this is it.

Marked Exhibit "B."

5th exception.

Whereupon the prosecution offers in evidence the following indictment:

EXHIBIT "B."

District Court of the United States of America for the Western Division of the District of South Dakota, in the Eighth Circuit.

At a stated term of the district court of the United States of America for the western division of the district of South Dakota, begun and held at the city of Deadwood, within and for the district and circuit aforesaid, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and ninety-six, and continued by adjournments to the seventeenth day of September, in the year last aforesaid.

The grand jurors of the United States of America, good and lawful men, summoned from the body of the western division of the district aforesaid, then and there being duly empanneled, sworn, and charged by the court aforesaid to diligently enquire and true presentment make for said district of South Dakota, in the name and by the authority of the United States of America, upon their oaths do present that Frank Parley alias Thomas J. Wallace, Tom Whalen alias Ed. Baxter, alias John P. Carroll, and Frank King, late of the county of Brown, in said district, heretofore, to wit, on the 7th day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at Highmore, in the county of Hyde, in the district aforesaid, and within the ex-

38 clusive jurisdiction of this court, feloniously did forcibly break into a post-office, to wit, the post-office of the said United States at Highmore aforesaid, with intent the moneys, postage stamps, goods, and chattels of the said United States, in the said post-office then being, then and there feloniously to steal, take, and carry away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that Thomas J. Wallace, alias Frank Parley; Tom Whalen alias Ed. Baxter, alias John P. Carroll, and Frank King,

late of the county of Brown, in the district aforesaid, heretofore, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at Highmore, in the county of Hyde, in the district aforesaid, and within the exclusive jurisdiction of this court, feloniously did forcibly break into a post-office of the United States at Highmore aforesaid and did then and there feloniously steal, take, and carry away from said post-office of the United States at Highmore aforesaid three thousand seven hundred and fifty postage stamps of the said United States of the denomination of two cents and of the value of two cents each; one thousand two hundred and sixty-six postage stamps of the said United States of the denomination of one cent and of the value of one cent each; one hundred and forty postage stamps of the said United States of the denomination of four cents and of the value of four cents each; two hundred and fifty postage stamps of the said United States of the denomination of five cents and of the value of five cents each; eighty postage stamps of the said United States
39 of the denomination of eight cents and of the value of eight cents each, and United States Treasury notes, national bank notes, silver certificates, gold certificates, silver, nickel, and copper coins of the said United States and current money of the said United States, a more particular description of which the grand jurors are unable to ascertain, of the value of fifty dollars and nineteen cents, all of said postage stamps, United States Treasury notes, national bank notes, silver certificates, gold certificates, and silver, nickel, and copper coin then and there being the property of the said United States, contrary to the form, force, and effect of the statutes of the said United States in such cases made and provided and against the peace and dignity of the United States of America.

E. W. MILLER,
United States Attorney, District of South Dakota.

Here follows names of several witnesses sworn before the grand jury.

Pl'ffs' Exhibit B.

This indictment is endorsed as follows:

No. 191. The United States *vs.* Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ex. Baxter, alias John P. Carroll, and Frank King. A true bill. Harry Clark, foreman. Presented in open court by the foreman of the grand jury in the presence of the grand jury and filed as a record of this court this 17th day of Sept., A. D. 1896. C. E. Mellette, clerk. E. W. Miller, U. S. attorney, district of South Dakota.

To the offer of which indictment, Exhibit B, in evidence, as aforesaid, the said defendant, Joe Kirby, then and there objected for the reason that it is incompetent, irrelevant, and immaterial, and
40 that it does not conform to the allegations contained in the indictment in the case at bar; and, further, for the reason that the act of Congress approved March 3rd, 1875, under which it is sought to introduce this exhibit, as heretofore expressly stated by

the defendant, *in* unconstitutional; which objection was overruled, and to which ruling the defendant then and there duly excepted, which exception is settled and allowed, & Exhibit "B" read in evidence, as aforesaid.

Question asked Mr. Pendar by U. S. Attorney:

Q. What is the next record you have upon page 24?
A. Arraignment.

Page 24 above referred to offered in evidence; to which offer the defendant Joe Kirby then and there objected for the reasons given in the objections to the reception of Exhibit "B;" which objection was overruled; to which ruling the said defendant then and there duly excepted, and exception is settled and allowed.

6th exception.

Thereupon said page 24 was read to the jury as follows:

THE UNITED STATES
vs.
FRANK PARLEY, alias THOMAS J. WALLACE; TOM Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King.

No. 191.
Arraignment.

Now comes E. W. Miller, Esq., U. S. attorney, and asks the court to arraign said defendants, Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, upon the indictment heretofore found against them for the crime of breaking into a U. S. post-office with*in* intent to commit larceny therein.

Thereupon said defendants are duly arraigned according
41 to law. The indictment is read to them in open court by the U. S. attorney, and two o'clock this afternoon is set for hearing their plea.

Thereupon the prosecution offered in evidence page of said journal, being the plea of said defendants, as follows:

7th exception & marked.

PLAINTIFF'S EXHIBIT "D," F. R. S.

THE UNITED STATES
vs.
FRANK PARLEY, alias THOS. J. WALLACE; TOM Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King.

No. 191.
Plea: Not Guilty.

This being the time set by the court for hearing the plea of above defendants upon the indictment heretofore found against them, and they, with their attorneys, being present in court, each for himself enters his plea of not guilty.

To which defendant objects for same reasons given to Exhibits "B" & "C" aforesaid; which objections is overruled, & to which ruling the defendant Joe Kirby then & there duly excepted, & exception settled & allowed.

8th exception.

And thereupon plaintiff offered in evidence page 30 of said Journal, being Plaintiff's Exhibit "E" & "F;" to which offer defendant objected for same reason as to Exhibit "B;" which objection is overruled, and to which ruling defendant Joe Kirby then & there duly excepted, & exception settled & allowed & said exhibit read in evidence.

42 PLAINTIFF'S EXHIBIT "E," F. R. S.

THE UNITED STATES
vs.
FRANK PARLEY, alias THOS. J. WALLACE; TOM WHALEN, alias Ed. Baxter, alias John P. Carroll, and Frank King. } No. 191.

On motion of defendants' attorney it is ordered that above defendants be given separate trials, and the U. S. attorney elects to try Frank King.

PLAINTIFF'S EXHIBIT "F," F. R. S.

THE UNITED STATES
vs.
FRANK KING. } No. 191. Trial.

Now above case is called for trial. The following jurors are drawn, sworn on *voir dire*, and examined as to their qualifications, viz:

1, Frank Abt; 2, J. S. McClintock; 3, R. F. Connor; 4, William Brooks; 5, John B. Mars; 6, R. L. Ketcham; 7, Sam'l Schwarzold; 8, Thos. C. Bentley; 9, Richard Grady; 10, Sharon Evans; 11, Myron Wilsie; 12, Jos. Brunschmidt.

Myron Wilsie is challenged peremptorily by defendant's attorney and Wm. Gardner is drawn on *voir dire* and examined. Thereupon the jury is accepted and are sworn to try the case.

On motion of defendant's attorney it is ordered by the court that all witnesses in above case be excluded from the room during the progress of the trial.

The following witnesses are called, sworn, and examined on behalf of the United States, viz:

43 1, T. W. Howey; 2, S. S. Meigs; 3, Harlow B. Hall; 4, Denton B. Thayer; 5, Wm. Crane; 6, H. L. Graham; 7, Kate Mattusch; 8, Amos Wyley; 9, H. A. Ostrich; 10, J. C. Woodruff; 11, Wm. O. Lawson; 12, Mable M. Lawson; 13, Benj. Lester; 14, Benj. Haverly; 15, Wm. Tomey; 16, W. C. French; 17, M. R. English; 18, J. H. Howe; 19, B. P. Hoover; 20, Orville Bennett; 21, Morris Bennett; 22, Geo. S. Hopkins; 23, P. Harry Sand; 24, H. L. Hassell; 25, C. C. Halphide.

9th exception.

And thereupon page 32 of said journal is offered in evidence; to which the said defendant, Joe Kirby, then & there duly objects for

the same reasons assigned to Exhibit "B" aforesaid, which objection is overruled, and to which ruling the said defendant then & there duly excepted, & which exception is hereby settled & allowed, & said page as Exhibit "G" read in evidence.

PLAINTIFF'S EXHIBIT "G," F. R. S.

THE UNITED STATES
vs.
FRANK KING. } No. 191. Trial.

SATURDAY, *Sept.* 19, 1896.

Now the trial of above case is continued. F. W. Howey and D. B Thayer are recalled and examined as Government witnesses.

26, Samuel ——; 27, Thos. M. Wallace; 28, John Cook; 29, R. L. Tremain, and 30, M. C. Fosness, are called, sworn, and examined as Government witnesses.

Thereupon the case is argued by S. B. Van Buskirk and E. W. Miller for the United States and Jos. B. Moore for the defense, and the jury is duly charged by the court. At four o'clock p. m. the jury retire in charge of Geo. J. Jarchow and Martin McDonough, bailiffs, duly sworn for that purpose.

At five o'clock p. m. the jury return into court. Their
44 names are called, and, all being present, they present to the court the following verdict:

United States District Court, District of South Dakota.

THE UNITED STATES
vs.
FRANK KING. } No. 191. Verdict.

We, the jury in the case of The United States *vs.* Frank King find the defendant guilty as charged in the indictment.

FRANK ABT,
Foreman Jury.

Thereupon the jury is excused from further consideration of the case by the court, and 10 o'clock tomorrow morning is set for pronouncing sentence.

10th exception.

And thereupon the prosecution offers page 33 of said journal, marked Exhibit "H," in evidence; to which said defendant then & there duly objected for the reasons given to Exhibit "B," &, further, that the plea of guilty entered by said defendants *are* not binding on this defendant; which objection is overruled, & to which ruling the said defendant then & there duly excepted, & exception is settled and allowed & said exhibit read in evidence, as follows:

PLAINTIFF'S EXHIBIT "H," F. R. S.

THE UNITED STATES
vs.
THOS. J. WALLACE, ED. BAXTER, and Frank King. } No. 191. Plea: Guilty. Withdrawal of Plea Not Guilty.

MONDAY, *Sep.* 21, 1896.

Now come above defendants, Thomas J. Wallace and Ed. Baxter, and ask the court to be allowed to withdraw their former plea of not guilty and to enter their plea of guilty to said indictment,
45 which is granted by the court, and said defendants, Ed. Baxter and Thos. J. Wallace, each for himself enters their oral plea of guilty to said indictment, and 1.30 o'clock p. m. is set by the court for pronouncing sentence on the three defendants and Frank King. 11th exception.

And thereupon the prosecution offers in evidence pages 38 & 39 of said journal, marked Exhibit "I;" to which defendant Joe Kirby objects for same reasons given to Exhibit "B" & "H," &, further, the record does not disclose as to which count of said indictment said defendants therein were guilty under. Objection overruled by the court; to which ruling defendant Joe Kirby duly excepted, & exception is settled & allowed & Exhibit "I" read in evidence.

PLAINTIFF'S EXHIBIT "I," F. R. S.

THE UNITED STATES
vs.
FRANK PARLEY, alias THOMAS J. WALLACE; TOM Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King. } No. 191.

MONDAY, *Sept.* 21, 1896.

Convicted of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein.

Now, on this the 21st day of September, A. D. 1896, the United States district attorney and the above-named defendants, Frank Parley, alias Thomas J. Wallace, with his counsel, came into court, and this being the day fixed by the court for pronouncing judgment upon the plea of guilty of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein, as charged in the indictment, the said defendant is now asked by the court if he has any legal cause to show why the judgment of the law upon said plea of guilty should not be
46 pronounced against him.

And the said defendant now answers that he has no cause to show, and the said defendant having duly plead guilty of the crime of breaking into a post-office of the United States at High-

more, South Dakota, and committing larceny therein in said United States district court for the district of South Dakota—

It is now by the court here considered, ordered, and adjudged, and the sentence of the court is, that you, Frank Parley, alias Thomas J. Wallace, be imprisoned in the penitentiary at Sioux Falls, in the county of Minnehaha, in said State of South Dakota, for and during the term or period of four years at hard labor, there to be kept, fed, and clothed according to the laws regulating said prison, and while so confined you shall be exclusively under the control of the officer or officers having lawful charge of said prison.

And that you pay as a fine to the United States the sum of — dollars, and that you stand committed until this sentence be complied with.

By the court:

JOHN E. CARLAND, *Judge.*

12th exception.

And thereupon the prosecution offers in evidence Exhibit "J;" —which defendant Joe Kirby objects for the same reasons given to Exhibit "I," for the further reason there is no allegation in the indictments of separate judgments. Objections overruled; to which ruling the defendant Joe Kirby then & there duly excepts, & exception is hereby settled & allowed & Exhibit "J" read in evidence as follows:

47 PLAINTIFF'S EXHIBIT "J." F. R. S.

THE UNITED STATES
vs.
FRANK PARLEY, alias THOMAS J. WALLACE; TOM Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King. } No. 191.

Convicted of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein.

Now, on this the 21st day of Sept., A. D. 1896, the United States district attorney and the above-named defendant, Tom Whalen, alias Ed. Baxter, alias John P. Carroll, with his counsel, came into court, and this being the day fixed by the court for pronouncing judgment upon the plea of guilty of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein, as charged in the indictment, the said defendant is now asked by the court if he has any legal cause to show why the judgment of the law upon said plea of guilty should not be pronounced against him; and the said defendant now answers that he has no cause to show, and the said defendant having duly plead guilty of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein in said United States district court for the district of South Dakota—

It is now by the court here considered, ordered, and adjudged, and the sentence of the court is, that you, Tom Whalen, alias Ed.

Baxter, alias John P. Carroll, be imprisoned in the penitentiary at Sioux Falls, in the county of Minnehaha, in said State of South Dakota, for and during the term or period of four years at hard labor, there to be kept, fed, and clothed according to the laws regulating said prison, and while so confined you shall be ex-
48 clusively under the control of the officer or officers having lawful charge of said prison.

And that you pay as a fine to the United States the sum of — dollars, and that you stand committed until this sentence be complied with.

By the court:

JOHN E. CARLAND, *Judge.*

PLAINTIFF'S EXHIBIT "K," F. R. S.

THE UNITED STATES
vs.
FRANK PARLEY, alias THOMAS J. WALLACE; TOM Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King. } No. 191.

Convicted of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein.

MONDAY, *Sept.* 21*st*, 1896.

Now, on this the 21st day of Sept., A. D. 1896, the United States district attorney and the above-named defendant, Frank King, with his counsel, came into court, and this being the day fixed by the court for pronouncing judgment upon the conviction of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein, as charged in the indictment, the said defendant is now asked by the court if he has any legal cause to show why the judgment of the law upon said conviction should not be pronounced against him, and the said defendant now answers that he has no cause to show, and the said defendant having been duly convicted of the crime of breaking into a post-office of the United States at Highmore, South Dakota, and committing larceny therein in said United States district court for the district of South Dakota:

49 It is now by the court here considered, ordered, and adjudged, and the sentence of the court is that you, Frank King, be imprisoned in the penitentiary at Sioux Falls, in the county of Minnehaha, in the said State of South Dakota, for and during the term or period of five years at hard labor, there to be kept, fed, and clothed, according to the laws regulating the said prison, and while so confined you shall be exclusively under the control of the officer or officers having lawful charge of said prison.

And that you pay as a fine to the United States the sum of — dollars, and that you stand committed until this sentence be complied with.

By the court:

JOHN E. CARLAND, *Judge.*

B. M. LISTER, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. B. M. Lister.
Q. Where do you live?
A. Nine miles north of Blunt, South Dakota.
Q. Where did you reside in June, 1896?
A. Same place.
Q. What was your business at that time?
A. Farmer.
Q. I will ask you if you know the Frank King, Frank Parley alias Thomas J. Wallace, and Tom Whalen alias Ed. Baxter, the same parties named in the indictment.

13th exception.

Defendant's counsel object upon the ground that the witness is not competent to testify as to whether they are the parties named in the indictment. Objection overruled; to which ruling
50 the defendant excepts, & exception is allowed.

A. I have seen men they called by them names.
Q. Where did you first see them?
A. Seen them at my place.
Q. All three of them?
A. Yes, sir.
Q. When?
A. On June 7th, I believe.
Q. What day of the week?
A. Sunday morning.
Q. Where is your place?
A. Nine miles north of Blunt, Sully county.
Q. This State?
A. Yes, sir.
Q. Where did you first see them?
A. At my place.
Q. At your place?
A. Yes, sir.
Q. How long did they stay there?
A. Probably half an hour.
Q. What, if anything, did they do while they were there?
A. Ate breakfast.
Q. Did you eat at the same table with them?
A. Yes, sir.
Q. State, if you know, what direction they went when they left your place.
A. North.
Q. Towards Gettysburg?
—. ——.
Q. Who, besides yourself, of your family was at home that day?
A. My wife.
Q. She also was present when they came?

A. Yes, sir.
Q. How far is your place from Highmore?
A. I don't know the exact distance; I judge it was some thirty or thirty-five miles.
Q. How far did you say it is from Blunt?
A. Nine miles.
Q. What direction from Blunt?
A. North.
Q. What kind of a day was this?
A. It was a rainy morning.
Q. What time of day was it when you first saw them?
A. I should judge it was about six o'clock.
Q. In the morning?
A. Yes, sir.
Q. How were they travelling?
A. On foot.
51 Q. Where did you first see them—where were they when you first saw them?
A. Two of them came around where I was milking.
Q. Where was the other one?
A. The other two stopped at the house, I believe.
Q. When did they leave your place?
A. About half an hour after they came there; somewhere between six and seven.
Q. Did they pay you for their breakfast?
A. Yes, sir.
Q. Do you remember what they paid you in?
A. Why, two of them paid me in dimes and nickels; one gave me a dollar.
Q. Where did you next see these men?
A. At Huron.
Q. When?
A. The day has slipped my memory. It was shortly afterwards.
Q. Under what circumstances did you see them then?
A. They were under arrest, charged with the crime of robbing the post-office at Highmore.
Q. They were all three at Huron at that time?
A. Yes, sir.
Q. When did you next see them, if at all?
A. Deadwood.
Q. When and under what circumstances?
A. When United States court was held at Deadwood last fall. The date has slipped my memory.
Q. Where did you see them there?
A. I saw them get off the train and I saw them in court.
Q. You was one of the witnesses in the case?
A. Yes, sir.
Q. You remember the time that you saw them next after that?
A. I don't believe I have seen but one of them since.
Q. Where did you see him?
A. At the penitentiary.

Q. When?
A. Last month.
Q. What penitentiary?
A. At Sioux Falls.
Q. Which one was it you saw there?
A. The one called Wallace.

52 Cross-examination by Judge AIKENS:

Q. How long after you saw them that morning they took breakfast with you before you saw them at Huron?
A. I couldn't tell just the length of time. It was probably two weeks.
Q. What are these men's names who called on you that morning for breakfast?
A. I afterwards heard them called by the names of Wallace and King, and, I suppose, Baxter.
Q. There were three men that stopped at your house?
A. Four men stopped at my house.
Q. Four?
A. Yes, sir.
Q. Then you never satisfactorily to yourself identified but two of them?
A. No.
Q. That was the one that goes by the name of Wallace and the other by the name of King?
A. Yes.
Q. Was your place the one that has a vacant house across the road?
A. No, sir.
Q. You say they came to your corral where you were milking?
A. Two of them did.
Q. Which two came there?
A. Wallace and I believe it was this man I am not positive of—Baxter.
Q. Well, it was Wallace and one that you could not identify?
A. Yes, sir.
Q. What day of the month was this?
A. I believe it was the 7th of June.
Q. What day of the week was it?
A. Sunday morning.
Q. You live nine miles north of Blunt, and how far is Blunt west from Highmore?
A. I don't know exactly; somewhere in the neighborhood of twenty-five miles. I don't know the exact distance.

53 Q. They each paid for their meals, did they, separately?
A. No; two of them paid for their meals, and then this man Wallace paid for two.
Q. How much did they give you altogether?
A. Gave me twenty cents apiece.
Q. They stayed with you about half an hour?

A. In the neighborhood of half an hour.
Q. Busy eating during all the time they were there?
A. No, sir.
Q. How did you happen to go to Huron to identify them?
A. I was summoned there.
Q. Any one call upon you before you went to Huron to ascertain what you knew about it?
A. Yes, sir.
Q. Who was it?
A. Fosness.
Q. M. C. Fosness, the post-office inspector?
A. Yes, sir.
Q. I will ask you if they were dressed just the same when you saw them at Huron.
A. No, sir.
Q. Different clothes?
A. Yes, sir.
Q. Were their beards just the same?
A. No, sir.
Q. Any of them have full beard when they were at your house?
A. Yes; this man I didn't recognize had more than two weeks' beard.
Q. Did either Wallace or King have beard at your place?
A. No, sir; nothing more than a short growth.
Q. They didn't have the same clothing on at Huron?
A. Let me explain. They had mustaches.
Q. Did they have one when they were at Huron?
A. Yes, sir.
Q. Both of them?
A. Yes, sir.
Q. You had no difficulty in identifying them?
A. No, sir.

54 Redirect examination by Mr. ELLIOTT:

Q. You said that you wasn't sure as to Baxter—you stated on cross-examination that you wasn't sure. I will ask you to state your best judgment.

14th exception.
Defendant's counsel objects to his judgment as incompetent.
Objection by the court overruled; to which ruling defendant excepts, and exception allowed.

A. My judgment is that he is the man.
Q. There was no line of railroad between Blunt and Gettysburg, was there?
A. No, sir.
Q. Blunt is a station between Pierre and Highmore?
A. Yes, sir.
Q. On the Northwestern?
A. Yes, sir.

Q. Do you know the time of the regular trains at that time on that road?

A. I don't know the exact time, but they was somewheres about two o'clock, I think, or in the neighborhood of two o'clock.

Q. You know there were regular trains?

A. Yes; running west.

Q. That is, the night before?

A. Yes.

Witness excused.

M. HAVERLY, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?

A. Madison Haverly.

Q. Where do you reside?

A. I reside north of Blunt.

Q. Where did you live in June, 1896?

A. North of Blunt about twenty miles.

Q. In what county?

A. Sully county.

Q. And in this State?

A. Yes, sir.

55 Q. I will ask you if you know the witness B. M. Lister, who was upon the stand.

A. Yes, sir.

Q. How far do you live from his place, if you know?

A. Ten or eleven miles.

Q. What direction?

A. A little southwest.

Q. His place is — of you?

A. Yes.

Q. And your place?

A. A mile east and about ten miles north.

Q. I will ask you if you know the defendants named in this indictment as Wallace, Baxter, and King.

A. Yes, sir; I understood that was their names.

Q. Where did you first see them?

A. Saw them at my place.

Q. When?

A. The 7th day of June, 1896.

Q. You mean your home there?

A. Yes, sir.

Q. What time?

A. All the way between half past ten o'clock and twelve.

Q. How were they travelling?

A. They were afoot.

Q. They were together—travelling together?

A. Yes, sir.

Q. Where did you first see them?

A. I saw them at my house.

Q. Didn't see them when they were coming then?
A. No, sir.
Q. What, if anything, was done there by them?
A. One of them came to my house for milk. We gave it to him.
Q. Where did he take it?
A. He took it into a little house across the road.
Q. Which one was that?
A. The big fellow; the man they called Wallace.
Q. Did you afterwards see the others?
A. Yes, sir.
Q. How many?
A. There were four altogether?
Q. Well, we have only to do with these three. Did they all come to the house?
A. Finally; yes, sir.
Q. What did they do there?
A. They ate dinner.
56 Q. How long did they stay there?
A. They was at the house I live in long enough to eat dinner and go.
Q. Where did they go?
A. They ate dinner and went north.
Q. Towards what place?
A. Gettysburg.
Q. How far?
A. Eighteen miles north.
Q. Did they pay you for their dinner?
A. Yes, sir.
Q. What, if anything, was done by them there that caused you to particularly notice them and be able to identify them?
A. I don't know; we was talking in a general way. I don't know as there was anything particularly done.
Q. Did you eat dinner with them?
A. Yes, sir; I ate dinner there at the table.
Q. Did they pay you for their dinner?
A. Yes, sir.
Q. Do you remember what they paid you?
A. Handed me a dollar and the other fifty cents. I gave them fifty cents back and kept the dollar.
Q. What time did they leave there?
A. It was very nearly noon when my wife got dinner for them.
Q. What direction did they go?
A. Due north.
Q. They went after dinner?
A. Yes, sir.
Q. When did you next see them?
A. The next morning, at Gettysburg.
Q. Where did you see them at Gettysburg?
A. In Mr. French's billiard hall.
Q. The same three men?
A. Yes, sir.

Q. What time was it when you saw them there?
A. It was in the neighborhood of noon; I went up in the morning. I don't know just what time it was.
Q. You next saw them at Huron?
A. Yes, sir.
Q. And when was that?
A. It was along between the middle and last of June; I don't remember the date.
57 Q. Under what circumstances?
A. They were under arrest.
Q. And when did you next see them, and where?
A. I saw them next at Deadwood.
Q. And when?
A. In September; along about the 10th to the middle of September.
Q. Where did you see them at Deadwood first?
A. I saw them when they got off the train.
Q. Where did you next see them?
A. I saw them in the court-room.
Q. Was they on trial?
A. Yes, sir.
Q. Were you present when the sentences were given?
A. Yes, sir.
Q. Have you seen them since that time?
A. Yes, sir.
Q. When and where?
A. Sioux Falls, in April; along about the last of April; in Sioux Falls.
Q. Where?
A. Penitentiary.
Q. What kind of a day was this?
A. Rainy day—called a rainy day that they was at my place.
Q. The Sunday?
A. Yes, sir.

Cross-examination by Judge AIKENS:

Q. There were four men?
A. Yes, sir; four men.
Q. Have you seen the fourth man since that time?
A. Yes, sir.
Q. Saw him at Gettysburg, I suppose?
A. I did.
Q. Saw him at Huron?
A. No, sir.
Q. You say it was anywhere from half past ten in the morning to noon when you first saw these men?
A. Yes, sir.
Q. Wallace came to the house after milk?
A. Yes, sir.
Q. They were stopping in a vacant house across the road?
A. Yes, sir.

Q. How long?
A. About half an hour.
Q. After eating their dinner and paying for their meal
58 they went directly north?
A. Yes, sir.
Q. It was a rainy day?
A. Yes, sir.
Q. It was easy enough to see people walking?
A. Yes, sir.
Q. You went up to Gettysburg and saw them the next day?
A. Yes, sir.
Q. How long a time did you spend in their company?
A. Oh, probably five minutes.
Q. All four of them there?
A. All four of them there.
Q. What time of day was it?
A. Well, I don't know; it was along in the middle of the day some time. It was a cloudy day, and I didn't carry any time.
Q. Don't remember what time you got home that day?
A. Got home at night; yes, sir.
Q. Remember what time you got home that night?
A. No, sir.
Q. How far is it from your place to Gettysburg?
A. Eighteen miles—call it eighteen.
Q. These men dressed the same when you saw them at Huron as when you saw them at home and at Gettysburg?
A. No, sir.
Q. Was the fourth man there?
A. No, sir.
Q. Now, can you state about how much time you spent with them?
A. No, sir.
Q. You didn't play billiards with them?
A. No, sir; something I never done in my life.
Q. Well, did you take a drink with them?
A. I did; yes, sir.
Q. Well, you had a pretty good time with them?
A. Yes, sir.
Q. How long did you stay with them?
A. About five minutes.
Q. You were not out in the alley back of the building, rushing the can?
A. No, sir.

Witness excused.

59 *French.*

W. C. FRENCH, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
—. W. C. French.

Q. Where do you live?
A. Gettysburg, South Dakota.
Q. Where did you live in June, 1896?
A. Gettysburg, South Dakota.
Q. What was your business at that time?
A. Running a billiard hall; saloon.
Q. Do you know the persons named in the indictment and known as Wallace, Baxter, and King?
A. Yes, sir.
Q. When did you first see them?
A. I saw them in my place on the 8th day of June, about a year ago.
Q. Do you remember what day of the week that was?
A. On Monday.
Q. What time of the day did they come to your place?
A. Part of them came in the forenoon, and they all came in the afternoon.
Q. Were there three or four of them?
A. Four of them.
Q. You say there were part of them there in the forenoon and all of them there in the afternoon?
A. Yes, sir.
Q. How late did they stay that afternoon; until supper time?
A. Yes, sir.
Q. How late did they stay that night?
A. Until two o'clock; maybe half past two.
Q. That is, Tuesday morning?
A. Yes, sir.
Q. What, if any, conversation did you hear between these parties as to shipping a package from there?

Defendant's counsel object upon the ground that it — incompetent, irrelevant, and immaterial, hearsay, not binding upon the defendant. Objection sustained.

Q. What, if any, statement was made by either of these men to the others relative to the shipment of a package to Joe?

Defendant's counsel objects upon the ground that it is incompetent, irrelevant, and immaterial hearsay; not binding upon this defendant. Objection sustained.

Q. When did you next see these men or either of them?
A. I saw them in Huron.
Q. Was all three of them in Huron?
A. Was three of them there.
Q. Where did you see them there at that time—under what circumstances?
A. They were there under examination.
Q. Before the United States commissioner?
A. Yes, sir.
Q. When was this?

A. I don't remember; some time not far from the time they were at my place.
Q. Where did you next see them?
A. Deadwood, South Dakota.
Q. Where did you first see them there?
A. At the platform when they got off the train.
Q. When did you next see them?
A. In the court-room.
Q. When they were on trial?
A. Yes, sir.
Q. And were you present when the sentences were pronounced?
A. Yes, sir.
Q. Have you seen them since that time?
A. No, sir.
Q. What, if anything, can you state as to the character of the money they spent there that day?
A. It was small change that they spent with me.
Q. How much did they spend with you that day?

Defendant's counsel object upon the ground that it is immaterial. Objection sustained.

61 Cross-examination by Judge AIKENS:

Q. You saw there four men?
A. Yes, sir.
Q. What were their names?
A. Baxter, Whalen, dago, and Wallace.
Q. Who did you see at Huron?
A. I saw the man that called himself Whalen, the dago, and Wallace.
Q. Which one was it you didn't see at Huron?
A. Baxter.
Q. Preliminary examination, you say, at that time?
A. Yes, sir.
Q. Before the United States commissioner at Huron?
A. I suppose that was it.
Q. You say a part of these men came to your billiard parlor in the morning; how many came in the morning?
A. There was two came in the forenoon.
Q. Which two?
A. This man Whalen was one; I would not be positive as to the other.
Q. Do you remember of Haviland coming there with them?
A. No, sir.
Q. He was there?
A. Yes, sir.
Q. Who else came in there while they were there?
A. I could not tell; there was a good many.
Q. When was your attention first called to these parties being there?
A. Something over a week from that time.

Q. Who inquired of you at that time?
A. Mr. Fosness.
Q. You remembered it as a distinct fact that they were there on the 8th day of June?
A. Yes, sir.
Q. How long was it after Mr. Fosness was there that you went to Huron?
A. I don't remember.
Q. Have any difficulty in identifying these men at Huron?
A. No, sir.
Q. Wear the same clothes that they had on in your billiard parlor?
A. I didn't look at their clothes.
62 Q. Were their beards the same?
A. No; I think not.
Q. What difference was there in the beard?
A. Well, it had been shaved off. This man King had his mustache shaved off, I think.
Q. He had it on before, had he?
A. Yes, sir; he was shaved the day he was there.
Q. Make any particular difference in the appearance of King that he had his mustache off at Huron?
A. No, sir.
Q. How large a man is King?
A. I should judge a man about a hundred and sixty pounds.
Q. How tall is he, about?
A. I should judge he was a man about five feet eight inches.
Q. What complexion?
A. Dark.
Q. What was the color of his mustache?
A. Dark.
Q. What do you mean by that, black, brown, or auburn?
A. Dark, black.
Q. What were his features?
A. Square.
Q. How is it about Whalen?
A. He is a smaller man.
Q. What is his complexion?
A. He has dark hair and brown whiskers.
Q. Taller or shorter than King?
A. There wasn't much difference in their height, but he was the smaller man.
Q. About how much would he weigh?
A. About a hundred and fifty to a hundred and sixty; somewhere along there.
Q. Which would you say was the tallest man of the two?
A. I don't know.
Q. About the same height?
A. Yes.
Q. The last time you saw them was at Deadwood. You haven't been up here to the pen. to look them over?

A. No, sir; haven't seen them since I was at Deadwood.

63 Q. What sort of a looking man was the fourth man that you didn't discover at Huron?

A. He was a small man.

Q. It was Baxter that you didn't see at Huron?

A. Yes, sir.

Q. Are you sure about that?

A. He was the man they called Baxter. Some of them called him Patsy.

Q. What did they call him at Huron?

A. I don't know; I didn't see him.

Q. What men did you see at Huron?

A. Whalen, the Dago, and Wallace.

Q. Well, what sort of a looking man was Dago?

A. I just described him to you; that man King.

Q. That man King the Dago?

A. Yes, sir.

Q. There was Wallace and King——

A. There was no King at my place at all.

Q. There was King at Huron?

A. Yes, sir.

Q. He was the man that they called Dago at your place?

A. Yes, sir.

Q. The man that they called Baxter at your place wasn't at Huron?

A. No, sir.

Q. Nor did you see him at Deadwood?

A. No; I didn't see him at Deadwood.

Q. About how long did they stay in your place in the forenoon?

A. They wasn't there but a few minutes; it was pretty near noon when they came there.

Q. How long do you think they stayed?

A. I couldn't say.

Q. Did they play any game there?

A. Not in the forenoon.

Q. In the afternoon? How soon was it after dinner that they came in?

A. I don't remember.

Q. How long did they stay after dinner?

A. They stayed there until supper time. They came in shortly after dinner.

64 Q. What were they doing?

A. Playing pool and playing cards.

Q. You had a card-room attachment to your billiard hall?

A. It was right in the billiard hall.

Q. What sort of a game of cards did they play?

A. Freeze-out poker.

Q. Was it poker for money?

A. It was for beer—cigars.

Q. So you had an opportunity of seeing these men practically all the evening?

A. Yes, sir.
Q. They were in there after supper?
A. Yes, sir; they were in there after supper.
Q. How long did they stay?
A. Until about two or half past two in the morning.
Q. What were they doing?
A. Playing pool and playing cards.
Q. The same as they did in the afternoon?
A. Yes.

Redirect examination by Mr. ELLIOTT:

Q. What did you say this man that they called Frank King was called at your place?
A. Dago.
Q. Frank Parley, alias Thos. J. Wallace, was called what?
A. Was called Wallace.
Q. And Tom Whalen, alias Ed. Baxter, alias John P. Carroll, was called what?
A. Called Whalen. This man up in the pen. was called Whalen in my place.

By Judge AIKENS:

Q. How do you know there is anybody in the pen.?
A. I heard him sentenced at Deadwood.
Q. How did you find out about their aliases?
A. I didn't say anything about an alias.
65 Q. You answered a question regarding aliases by the district attorney.
A. I heard it in court.
Q. You say the man that was called Baxter at your place you have never seen since?
A. Yes, sir; I have seen him since.

By Mr. ELLIOTT:

Q. You have seen him since?
A. Yes, sir.

By Judge AIKENS:

Q. That is, you haven't seen him *him* at Huron or at Deadwood or at the penitentiary?

Attorney for prosecution objects. Objection overruled. Exception allowed.

A. I didn't see him at Deadwood, Huron, nor in the penitentiary.

Witness excused.

Upon request of the prosecution, the jury is placed in charge of bailiff, after which court adjourned until 10 o'clock a. m. Wednesday, June 9th.

WEDNESDAY, *June 9th*, 1897.

All parties being present at ten o'clock a. m., the trial of said cause was resumed.

WILLIAM TWOMEY, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. William Twomey.
Q. Where do you reside?
A. Gettysburg, South Dakota.
Q. Where did you reside in June, 1896?
A. Gettysburg.
Q. What at that time was your business?
A. Keeping hotel.
Q. How long had you lived there?
66 A. Just about thirteen months. I went there the 8th day of May, 1895.
Q. You were keeping hotel. What was the name of the house?
A. It was called the Clark house.
Q. Do you know Frank Parley alias Thomas J. Wallace, Tom Whalen alias Ed. Baxter, alias John P. Carroll, and Frank King?
A. Well, I knew men that went by that name. I don't know anything about the aliases, though.
Q. When did you first see them?
A. They came to my place the evening of June 7th.
Q. To your hotel?
A. Yes, sir.
Q. What time in the evening?
A. About ten o'clock in the evening; not far from that.
Q. What day of the week?
A. On Sunday.
Q. What year?
A. 1896.
Q. When they first came what did they do?
A. They came up to the desk and registered.
Q. Have you the register?
A. No, sir; I have not.

Witness is shown Plaintiff's "Ex. L, F. R. S.," the same being the eighth, ninth, and tenth and eleventh lines of the exhibit, and is asked what it is.

WITNESS: These are the names that they put down on the register. This is a leaf out of the register I was using at that time.
Q. The registry was made in your presence—they registered in your presence?
A. Yes, sir; right there in the office.
Q. The exhibit is in the same condition as when you last saw it at the last term of court?
A. Yes, sir; I don't see any change.

67 Exhibit "L, F. R. S.," is offered in evidence.

Witness continuing: It would look as though they came there June 6th. Sunday it wasn't dated. It was June 7th that they came there.

15th exception.

Defendant's counsel object to the reception of Exhibit "L" in evidence for the reason that it is irrelevant, incompetent, and immaterial, hearsay in its nature, and not binding upon this defendant. Objection by the court overruled; to which ruling defendant excepts. Exception allowed.

Exhibit shown to jury by Mr. Elliott & read as follows:

EXHIBIT "L."

Clark house, Gettysburgh, South Dakota; Wm. Toomey, proprietor.

Name.	Residence.	Time.	Room.	
	SATURDAY, *June 6th*, 1896.			
(Here follows the registry of seven names:)				
John P. Carroll.....	Sheldon, Iowa.....	L....	10	Call 7 00
Thos. Wallace.....	" " ...	L....	10	" 7 00
Frank King.....	" "	L....	10	" 7 00
Ed. Baxter.....	" "	L....	10	" 7 00

Q. What time of day did you say it was they got there?

A. It must have been about—not far from ten o'clock in the evening.

Q. How long did they stay there with you?

A. They stayed there that night; the next day; the next night. They left Tuesday morning.

68 Q. When did you next see them after they went to bed that night?

A. The next day, along in the forenoon.

Q. What time?

A. I could not say just what time. It was between morning and noon.

Q. Was it early in the morning, or late?

A. It was late in the morning.

Q. State what you know as to what they did during the day there.

A. Well, all they done at my place to amount to anything was to eat their dinner and supper and behave themselves all right.

Q. Calling your attention to their inquiry, as to what, if any, inquiry was made to you as to the express office?

Defendant's counsel object upon the ground that it is incompetent, hearsay, and not binding upon this defendant. Objection sustained.

By Mr. ELLIOTT: That the court may understand the theory of the prosecution, this is for the purpose of identification.

Q. What, if anything, do you know of these men, or a portion of them, having gone to the express office that forenoon?
A. Well, I know that Wallace told me that he did.

Defendant's counsel object. The question calls for the personal knowledge of the witness. We object to the answer as incompetent and ask to have it stricken out.
By the COURT: Strike out what the witness states that Wallace said.

Q. Leaving out what he said, what do you know of their having gone there, if anything?
A. I don't know anything about it myself I didn't see him go.
Q. These men were at your place all that day, and were they at your place that night after supper?
69 A. Well, I didn't see them go to bed or I didn't see them get up. They had a room and paid for it.
Q. What time does the train leave there going east?
A. I think the time was 3.45.
Q. In the evening?
A. No, sir; in the morning. I think that is the time. I am pretty sure of it.
Q. Gettysburg is the end of the road?
A. Yes, sir; the end of the Northwestern road.
Q. When did you next see these men?
A. I saw three of them in Huron.
Q. Which three?
A. The ones that was called Wallace, Baxter, and King.
Q. When did you see them there and under what circumstances?
A. Why, I saw them in the United States commissioner's office, I believe it was called. I was summoned there as a witness.
Q. When did you next see them?
A. Saw them at Deadwood.
Q. Where?
A. In the court-room.
Q. You was present at the trial of King, was you, in September last?
A. Yes, sir.
Q. In the United States court there?
A. Yes, sir.
Q. Was you present at the time they were sentenced, the three of them?
A. Yes, sir; I was in the court-room when they were sentenced.
Q. You identified these men that were sentenced as the same that came to your place that Sunday evening?
A. Yes, sir; the same three.
Q. I will ask you to state the appearance of these men when they came—that is, as to how they had been travelling.
A. Well, sir, they looked like four tired men. They were wet

and their shoes and clothing were pretty well muddy up to
70 their knees. It had been raining nearly all day. It quit a little while along towards evening and then commenced again.

Q. How far is it from Gettysburg down to Blunt?

A. Why, it is thirty-six miles the straightest route that there is.

Cross-examination by Judge AIKENS:

Q. You saw Baxter at Huron?

A. Yes, sir—that is, they called him Baxter.

Q. Was Mr. French there the same time you were in Huron?

A. Yes, sir.

Q. Now, these men came into your hotel about ten o'clock at night?

A. About that time.

Q. You were behind the desk?

A. Yes, sir; I happened to be there at the time.

Q. And they registered, you say. Each one register for himself?

A. That is my recollection.

Q. Are you positive of it?

A. Well, I have studied about that considerable since I was on the witness stand here before, and it might be possible that Carroll wrote Wallace's name; but, outside of that, my recollection of it was that each one wrote his own name; but as to Wallace's name, I have studied over it a good deal. My recollection in Huron was that each one wrote their own name.

Q. You would not be certain about it?

A. I would not want to swear that Wallace wrote his. Carroll was the first man that registered. He wrote his own name. I would not want to swear positively that he didn't write Wallace's.

Q. These three men you saw at Huron, what were their names?

A. They went by the name of Wallace, Baxter, and King.

Q. Are they the same Wallace, Baxter, and King that
71 signed their names to the register?

A. Yes, sir; they are the men that were in my place.

Q. Carroll you didn't see at Huron?

A. No, sir.

Q. Did you see Carroll at Deadwood?

A. No, sir.

Q. Where in Deadwood did you first see these three men?

A. In the court-room.

Q. You didn't meet them at the train?

A. No, sir.

Q. How did you happen to go to Huron?

A. I went there as a witness; was subpœnaed by telegraph.

Q. Have any talk with any one before you were subpœnaed?

A. I had a talk with Mr. Fosness before that when he came there to look at the register. He asked me what my recollection was as to the description of the men.

Q. Who made these notations in lead pencil on the register?

A. Those are mine.

Q. That means that you gave them room, and they were to be called at ten o'clock in the morning?
A. Yes, sir.
Q. What day did that call have reference to?
A. Monday morning.
Q. That was made shortly after they registered?
A. It was made before they went to bed. The first notation I made there was to call them at 3.15, but they came back and said they were tired and didn't want to get up.
Q. They went out of the hotel after they registered at ten o'clock Sunday night?
A. Yes.
Q. What time did they return?
A. I think they came in before eleven and went to bed. That is my recollection.
Q. How many times do you think you saw them while they were stopping at your house?
A. I am sure I don't know. I saw them that evening twice, anyway; saw them the next forenoon, and at noon and at supper
72 time. They came to their meals, except to breakfast Monday morning. They didn't get up to breakfast at all.
Q. They paid their bill?
A. Yes, sir; paid in advance right along.
Q. Paid in advance?
A. Yes, sir; they did.

Witness excused.

OTTO SCHURZER, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. Otto Schurzer.
Q. Where do you live?
A. Gettysburg.
Q. This State?
A. Yes, sir.
Q. How long have you lived there?
A. Off and on since 1884.
Q. Where were you June 8th, 1896?
A. At Gettysburg.
Q. Do you know the persons named in this indictment as Wallace, Baxter, and King?
A. Yes, sir; called by those names.
Q. When did you first see them?
A. On the morning of June 8th.
Q. What day of the week?
A. Monday morning.
Q. Where did you first meet them?
A. On the street.
Q. At what place?
A. Gettysburg.

Q. How long was you with them?

A. With them, off and on, from some time after dinner until two o'clock in the morning.

Q. I will ask you what, if anything, you know of their having gone to the express office there that day, them or either of them.

A. Well, only from what I heard.

Q. I will ask you what, if anything, you know about their going, aside from what you heard.

A. No, sir.

Q. When did you next see these men? Did you see them that night?

73 A. Yes, sir.

Q. Until what time?

A. Until one or two o'clock in the morning.

Q. Where were you that night?

A. In Mr. French's saloon.

Q. You was there playing with them?

A. No, sir; I was looking on.

Q. Where did you next see them?

A. Sioux Falls.

Q. Where?

A. Up at the penitentiary.

Q. When?

A. Last April, I think it was, I was down here.

Q. You identified these three men as being the same three you describe here as having been with at Gettysburg?

A. Yes, sir.

Q. I will ask you to state what, if anything, you know as to the character of the money they spent there that night in the saloon, as to its being small change or otherwise.

Defendant's counsel objects upon the ground that it is irrelevant, incompetent, and immaterial, leading and suggestive in its character. Objection sustained.

Q. You may state what, if anything, occurred there that called your attention to these men particularly.

A. Why, they were strangers in the town, for one thing, and they seemed to be pretty free with themselves; in other words, they wanted to blow themselves.

Cross-examination by Judge AIKENS:

Q. That is, they were having a pretty good time and were willing to pay for it?

A. Yes.

Q. That is not unusual at Gettysburg, is it?

A. It is not a very frequent circumstance.

74 Q. You say you never saw these three men until you saw them in the penitentiary, in April, after being with them the afternoon and night of June 9th, 1896?

A. No, sir.

Q. How long after your association with them on that occasion was it before you disclosed the fact that you were with them at that time to anybody?

A. A chum of mine and I was talking about it right afterwards.

Q. It was to your chum right afterwards?

A. Yes, sir.

Q. Was that before you learned that they were suspected of any crime.

A. No, sir.

Q. Was it after?

A. Yes, sir.

Q. When, after notifying your chum, was it that you had any conversation with any one concerning the matter?

A. I think it was late in the fall. I never paid any special attention to it.

Q. To whom did you communicate at that time?

A. I was speaking with Mr. French.

Q. Now, you are absolutely certain that you met these men on the 8th day of June?

A. Last year?

Q. On the 8th day of June that you met these parties in French's saloon?

A. Why, I know it was on Monday morning.

Q. Where did you get your information that it was the 8th day of June?

A. Why, right here in the court-room.

Q. Then you have no independent recollection?

A. No, sir.

Q. And you rely upon what you have heard in the court-room as to that being the date?

A. No, sir.

Q. You don't remember of having testified, in response to the district attorney, that it was the 8th day of June?

75 A. I may have said that. I figured it out myself. It couldn't help but be the 8th day if it was Monday.

Q. It couldn't have been the first day of June and be Monday?

A. That would be after the first day then.

Q. Is it not a fact that your only recollection of the date is conversations with people who have taken an interest — this case and told you it was the 8th?

A. No, sir.

Q. You say you first met them on the street.

A. Yes, sir; I see them on the street.

Q. How did you happen to become acquainted with them?

A. They made some remark and inquiry.

Q. Did they invite you to French's?

A. I happened to be there when they came in.

Q. There were four of them?

A. Yes, sir.

Q. Four on the street together when you first met them?

A. Yes, sir.

Q. Did they introduce themselves to you?
A. No, sir; no more than any stranger would?
Q. They called each other by name, I suppose, and it was in that manner that you ascertained what their names were?
A. Yes, sir.
Q. Which three did you see in the penitentiary?
A. Why, one that I know was Wallace, Dago, and Whalen.
Q. Did the one called Dago go by any other name at Gettysburg?
A. I didn't hear him called by any other name.
Q. Wallace, Dago, and Whalen?
A. Yes.
Q. You say you were looking on at the game they were playing. What was it?
A. Playing freeze-out.
Q. Playing for the drinks?
A. Yes, sir.
Q. How many chips did they use?
76 A. Fifteen or twenty, I suppose; I didn't count them.
Q. Have a drink after every game?
A. I suppose so.
Q. Did you participate in that?
A. Yes.
Q. How many games did they play?
A. I couldn't tell you that; I didn't keep track.
Q. It was a rainy day, was it?
A. It was cloudy.
Q. Didn't rain any during the Monday that you spent with these people?
A. It might have sprinkled a few drops.
Q. You became quite intimate with them?
A. For strangers; yes.
Q. How large a man was Dago?
A. A fair-sized man; an average man.
Q. What, in your opinion, is an average man?
A. Why, about 165 to 170 pounds.
Q. How large a man was Whalen?
A. There wasn't but very little difference between them.
Q. Wallace?
A. He was a man that would weigh from 190 to 210 pounds.
Q. How long a time did you spend at the penitentiary when you were up there?
A. I went through. You could guess yourself how long that would take. I suppose I was there about an hour.
Q. How long a time did you spend in examining the prisoners?
A. Stayed there and looked at them about ten minutes, I suppose.
Q. Did they bring them up?
A. Yes, sir.
Q. Who brought them up—some officers?
A. Yes, sir.

Q. Who took you there; who invited you to go?
A. Mr. Fosness.
Q. You stayed in the office, and they brought up three men; is that right?
A. Yes.
Q. Then you didn't go through the penitentiary and pick out these three men from the convicts that were working there?
A. No, sir.
Q. Did they speak to you?
A. No, sir.
77 Q. Didn't seem to recognize you?
A. Didn't seem to pay any attention to anybody.
Q. You say they were up in the room about an hour?
A. No, sir; they were not.
Q. About how long were they there?
A. About fifteen minutes.
Q. Show you any other men up there?
A. Oh, yes, sir.
Q. Bring up into the room any other prisoners?
A. No, sir.
Q. Who called for the prisoners?
A. I couldn't tell you as to that.
Q. That was in April, and you hadn't seen them since the 8th of June, 1896?
A. No, sir.
Q. Had no difficulty in recognizing the three men?
A. Not a particle.
Q. As soon as you set your eyes on them?
A. There was one I looked at a second time. He had changed somewhat, but no trouble to identify him as the same man.
Q. I understand you to say that there was four with you all the time at French's?
A. Why, yes; that evening there was four all the time there.

Witness excused.

M. L. ENGLISH, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. M. L. English.
Q. Where do you reside?
A. Gettysburg, South Dakota.
Q. How long have you lived there?
A. I have lived in the town five years; around there about twelve.
Q. What is your business?
A. Merchandise.
Q. General merchandise?
A. Yes, sir.
78 Q. I will ask you if you know the persons named in this indictment as Wallace, Baxter, and King.

A. Yes, sir.
Q. Where did you first see them?
A. In the store.
Q. In your store?
A. Yes, sir.
Q. At?
A. Gettysburg.
Q. When?
A. Monday, the 8th day of June.
Q. What year?
A. 1896.
Q. As to what, if any, transaction you had with them at that time that caused you to especially notice them?
A. One of them came in first in the forenoon and bought some underwear which came to $1.10; a pair of socks, 20 cents. In the afternoon Wallace came in and bought a coat and vest and paid $4.50 in nickels and dimes.
Q. $4.50 in nickels and dimes?
A. Carroll paid the rest. The coat came to $6.50. Carroll paid the rest in silver dollars.
Q. What, if anything, was there in the payment to you that attracted your attention?
A. He had the money loose in his pocket. He took it out and threw it on the counter and said, "You better count this damned stuff; you are more used to it."

Defendant's counsel objects to what he said; incompetent.
The COURT: It would be admissible as to the point of identity, I think. Objection denied; to which ruling defendant excepted, & exception allowed.
15th exception.

Q. Was there anything further in connection with the payment in this case, where the money was taken from or otherwise, that called your attention to them?
A. Carroll, when he paid the other two dollars——

79 Defendant's counsel object to any performance on the part of Carroll.

Q. This man that you speak of as Carroll, that you were going to tell about, was he one of the men that you saw at Deadwood?
A. No, sir.
Q. He was the fourth man that you speak of?
A. Yes, sir.
Q. When did you next see these three men?
A. I saw the four of them sitting on the sidewalk in front of the hotel that same night.
Q. Where did you next see them?
A. At Deadwood.
Q. When?
A. 15th or 16th of September, 1896.
Q. Where did you see them there first?

A. On the street coming from the depot.
Q. See them in the court-room?
A. Yes, sir.
Q. Was you present at the trial of King?
A. Yes, sir.
Q. Were you present when they were sentenced?
A. Yes, sir.
Q. Have you seen them since that time?
A. I seen Baxter — Wallace at the penitentiary the 13th of April.

Cross-examination by Judge AIKENS:

Q. Was Wallace at the penitentiary, you say?
A. Yes, sir.
Q. Didn't see any one else there?
A. No, sir.
Q. How did you happen to see him?
A. Just looking through the penitentiary and saw him out shovelling dirt.
Q. Then, from the 8th day of June to the 16th of September you hadn't seen him?
A. No, sir.
Q. How did you happen to go to Deadwood; subpœnaed there?
A. Yes, sir.
Q. You didn't go down to Huron to the preliminary examination?
80 A. No, sir.
Q. Who was it came to the store in the morning?
A. Carroll—the little fellow.
Q. He is the man that you didn't see at Deadwood?
A. Yes, sir.
Q. And he came in again in the afternoon with Wallace?
A. Yes, sir.
Q. Did you see the other two?
A. King came in before.
Q. Did he make any purchase?
A. No, sir.
Q. What was he doing, if anything?
A. Just looking around.
Q. How long did they stay?
A. Fifteen or twenty minutes; long enough to fit a coat and vest.
Q. You had no difficulty whatever in identifying these men after that transaction that you had with them that you speak of in the store, when you saw them in Deadwood?
A. No, sir.
Q. You recognized King and Baxter as readily as you did Wallace?
A. Yes, sir.
Q. Any difference?
A. No, sir.

Q. That these were the men that on the 8th day of June were in your store at Gettysburg?
A. Yes, sir.
Q. How do you know it was the 8th day of June?
A. I know it was.
Q. How do you know it was?
A. Circumstances connected with it.
Q. Keep a cash account of sales?
A. Yes, sir.
Q. Did you of this transaction?
A. Yes, sir.
Q. Make a description of them?
A. No, sir.
Q. You are willing to testify that it was the 8th day of June that these three men were in your store?
A. Yes, sir.
Q. How large an annual business do you do up there?
A. About sixteen thousand a year.
Q. General merchandise business or just clothing?
A. General merchandise.
Q. Nothing strange to have people come in there that you have never seen before?
A. Oh, once in a while.
81 Q. Do you remember of any distinct circumstance of a stranger coming there since that time?
A. No, sir.
Q. You don't?
A. No, sir.
Q. To whom did you first communicate this fact?
A. The first I spoke after they went out about spending so many nickels and dimes was to Ben. Craig.
Q. When did you first speak to any one connected with the prosecution of this case—to any one in regard to it?
A. That was when we went out to Deadwood.
Q. You don't mean to say that you were subpœnaed out to Deadwood without disclosing the facts to any one?
A. I disclosed the fact to Mr. Ells(?), the postmaster at Gettysburg.
Q. You disclosed the fact to him?
A. Yes, sir.
Q. How long before you went to Deadwood?
A. Oh, that was six weeks.
Q. Six weeks before you went to Deadwood?
A. About.
Q. When did you first see them out at Deadwood—these three men; at the station?
A. They were on the street coming from the station.
Q. Who was with you?
A. I don't know as any one was.
Q. Who was with them?
A. Deputy United States marshal.

Q. You had no difficulty in recognizing them?
A. No, sir.
Q. You knew that these men were coming in charge of a deputy marshal, did you?
A. I didn't know that they were coming that day.
Q. Were they handcuffed?
A. No, sir.
Q. Were there any other prisoners with them except the three?
A. No, sir.
Q. You knew as soon as you set your eyes on them that
82 these were the three men that came into your store that day?
A. Yes, sir.

Witness excused.

BEN. P. HOOVER, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. Ben. P. Hoover.
Q. Where do you reside?
A. Gettysburg, South Dakota.
Q. How long have you lived there?
A. In the town of Gettysburg nearly three years.
Q. How large a place is Gettysburg, or was it in June, 1846?
A. Between five and six hundred.
Q. I will ask you if you know the persons named as Wallace, Baxter, and King in this indictment.
A. I do.
Q. When and where did you first see them?
A. Gettysburg, South Dakota, June the 8th—Monday—1896.
Q. Where did you see them there?
A. On the street.
Q. In the afternoon?
A. Yes, sir.
Q. Where did you next see them?
A. At Huron.
Q. Did you see them more than once at Gettysburg?
A. All that afternoon.
Q. How many times?
A. Oh! several times.
Q. I will ask you what, if anything, occurred there that day that caused you to take especial notice of them to enable you to identify them when you next saw them.

Defendant's counsel object for the reason that it assumes a fact not proven.

A. I had been requested by the postmaster to notify him at any time any suspicious characters came to town. I saw these
83 parties there and I notified the postmaster that they were there.
Q. Did you see them the next morning?

A. I did not.
Q. Where were you the next day?
A. I think I went to Yankton, Tuesday.
Q. You left Gettysburg when?
A. Tuesday morning.
Q. Do you remember what time the train left there at that time?
A. 3.30 or 3.45; I have forgotten.
Q. Were these men on that train?
A. They were not as passengers. I looked the train over to see if they were there.
Q. Did you see them that day?
A. I saw four parties jump out of a box car.

Defendant's counsel object; not responsive.
By the COURT: He can answer it yes or no.

A. I won't say positive whether I did or not.
Q. What is the distance from Gettysburg to Redfield?
A. 76 miles.
Q. How far from Blunt?
A. Direct, 36 miles.
Q. Is there any other road?
A. Not at that time.
Q. Gettysburg is the end of the road?
A. The terminus of the Northwestern.
Q. I will ask you if you saw these three parties at Redfield the 9th?
A. I cannot say positive. I saw four parties jump out of a box car.

Defendant's counsel object.

Q. How far were you from these men?
A. 150 to 200 yards.
Q. When did you next see these parties?
A. At Huron.
Q. When?
A. I don't remember the date. About two weeks after, I should judge.
Q. You identified them as being the same men?
A. Three of them.
84 Q. Which three?
A. The names I am not familiar with. I think it was Baxter, King, and Wallace.
Q. Where did you next see them?
A. At Deadwood.
Q. Where were they?
A. In the court-room.
Q. Were you present at the trial of King?
A. I was.
Q. Were you present when sentence were pronounced?
A. I was not.

Q. Have you seen them since that time?
A. I have not.

Cross-examination by Judge AIKENS:

Q. What branch of the secret service do you belong to?
A. At that time I was deputy sheriff, United States commissioner, and receiver of a bank there.
Q. The postmaster had requested you to notify him of any suspicious characters?
A. Yes, sir.
Q. You hadn't any doubt that these men were suspicious characters?
A. Their general make-up led me to believe they were. I told the postmaster they were there, and that he had better lock his safe. I turned the combination on my own every time I went out.
Q. That you do every time you go out?
A. No, sir.
Q. How many times did you see them?
A. I don't know.
Q. What first called your attention to them?
A. They talked loud; were in an intoxicated condition.
Q. Where did they come from in this intoxicated condition?
A. From what we call a "blind pig."
Q. Is Gettysburg an incorporated town?
A. It is not.
Q. Have a marshall up there?
A. We have not.
Q. There is no peace officer up there?
A. Constable and sheriff.
85 Q. Now, what time in the afternoon did you first see these people?
A. It must have been two o'clock.
Q. What was their condition as to inebriety at that hour?
A. They were boisterous.
Q. Somewhat boisterous, were they? Where were you when you first saw them?
A. At my place of business.
Q. Four of them together, were there?
A. Four of them; sometimes two. They would walk around the town and size it up from different points of view. At the terminus of the road there we have very few tramps and we notice them at once.
Q. About how many times did you see them?
A. Oh, several times.
Q. Three might be several. Did you see them more than three times?
A. Yes.
Q. How many was there, there at Huron, when you first went there, under arrest?
A. Four.

Q. Were these the four that you saw at Gettysburg?
A. Three of them were.
Q. One of them was not?
A. I am very positive on that point.
Q. How close in contact did you come with these men?
A. Met them on the street.
Q. Had no difficulty in recognizing them?
A. I did not.
Q. Were they dressed the same?
A. They were not dressed the same.
Q. Where did you first see them at Huron?
A. In the commissioner's office.
Q. Who did you first disclose the fact to that you would recognize these men if you saw them before going to Huron?
A. I never disclosed it to any one.
Q. Just happpened at Huron, did you?
A. No, sir; subpœnaed
Q. Who did you tell that you could recognize them?
A. I didn't tell any one.
86 Q. Did you have any talk with Mr. Fosness?
A. I did.
Q. Didn't intimate to Mr. Fossness that you could recognize them?
A. I did not. I couldn't tell whether I could identify the men until I saw them.

Witness excused.

Howe.

J. H. Howe, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. J. H. Howe.
Q. What is your occupation?
A. Agent at Gettysburg for express company and Northwestern road.
Q. How long have you been at Gettysburg?
A. A little over three years.
Q. Held this position during all this time?
A. I have.
Q. And held that position in June, 1896?
A. I did.
Q. I will ask you if you know the persons named in this indictment as Wallace, Baxter, and King.
A. I do.
Q. When and where did you first see them?
A. I saw one of them at Gettysburg.
Q. Which one?
A. Wallace.
Q. Under what circumstances did you see him?

A. He was at my office.
Q. At your office?
A. At the express office.
Q. At Gettysburg?
A. Yes, sir.
Q. On what date?
A. June 8th, 1896.
Q. You may state what, if any, transaction you had with him there.
A. He bought a money order.
Q. Was any one with him.
A. Yes, sir.
87 Q. Whom, if you know?
A. He gave his name as Baxter.
Q. Have you seen this man Baxter since?
A. Not to recognize him.
Q. What, if any, further transaction did you have with them there?
A. Baxter shipped an express package from there.
Q. To where?
A. Sioux Falls.
Q. I will ask you if you made a waybill of it.
A. I did.

Witness is shown Plaintiff's Exhibit "M" and asked if that is the original waybill.

A. Yes, sir; that is the original waybill.
Q. In whose handwriting is it?
A. My own. I made it.
Q. At that time?
A. Yes, sir.

Exhibit "M" is offered in evidence by the prosecution.

Defendant objects to the reception of Exhibit "M" in evidence for the reason that it is incompetent, irrelevant, and immaterial; further, that the witness states that it was given to one E. Baxter, and that he has never recognized or identified Baxter since that time; therefore is incompetent to testify to any person named in the indictment to be binding upon the defendant; further, that it is not binding upon this defendant, nor is it claimed to be the act of Baxter, even though he had been identified by this party.

Objection by the court overruled; to which ruling defendant excepts, and exception allowed.

16th exception.

(Copy attached on this page.)

& Exhibit "M" read as follows:

88 PLAINTIFF'S EXHIBIT "M," F. R. S.

Freight Waybill.

American Express Co.

Time — m., No. 97, June 9, 1896.

From Gettysburg, S. D., to Sioux Falls, S. D.

No. packages.	From whom received.	To whom addressed.	Weight.	Prepaid charges.
1 pa.....	.....	Mr. Joe Kirby.....	2½	35

Q. I notice that this waybill does not state from whom the package was received. Can you state from whom it was received?

A. He gave his name as E. Baxter.

Exhibit shown to jury by Mr. Elliott.

Q. What, if any, other packages were shipped by you by express that day?

A. There was no other package.

Q. What record have you of shipment of packages?

A. We keep a record in a book furnished by the express company.

Q. Have you that record with you?

A. Yes, sir.

Q. The witness' attention is called to Plaintiff's Exhibit "N," the same being the third line of the record presented, together with the printed headings at the top of the columns, and is asked who made the record?

A. I made the record myself.

Q. When?

A. On June 8th, 1896.

Q. This was made in the regular course of your employment as such agent?

A. Yes, sir.

89 Exhibit "N" offered in evidence, which is herewith attached on this page. Defendant's counsel object upon the ground that it is incompetent, irrelevant, and immaterial, not binding upon the defendant, and for the further reason that there is no evidence produced in the case to show that any of the parties named in the indictment were connected with the matter regarding which this witness is examined.

PL'FF'S EX. N, F. R. S. (5.)

American Express Company.

Record of Waybills Forwarded from Gettysburg Office, June, 1896.

'97, JUNE 9.

No. packages.	Amount.	From whom received.	To whom addressed.	Destination.	Weight.	Charges advanced.	Our charges.	Prepaid charges.
1 pa..	.....	E. Baxter....	Mr. Joe Kirby	Su. Falls.	2½ #	.....	....	35

Objection by the court overruled; to which ruling defendant excepts, and exception allowed.

17th exception.

Exhibit shown to jury by Mr. Elliott.

Q. I will ask you to describe that package to the jury.

A. It was just about the size of a shoe box that would hold one pair of shoes.

Q. Do you remember the weight of it as to whether it was heavy or not?

A. Yes, sir; two pounds and a half.

Q. Upon what date was it shipped?

A. It left there on the morning of the ninth.

Q. What time?

A. 3.45.

Q. This express was carried on the Northwestern train—in connection with the train, was it?

A. Yes, sir.

Q. I am not clear, Mr. Howe, as to whether there was more than one trip. Were these men there more than once, at the express office?

A. But once.

Q. One bought a money order and the other sent a package?

A. The other sent a package.

Q. State, if you know, when by the ordinary route this package would reach its destination, what date.

A. It should have reached here the evening of the 9th; I
90 think the trains ran the same then as they do now.

Cross-examination by Judge AIKENS:

Q. You say that you have seen Wallace once since that time?

A. I have seen him since that; yes, sir.

Q. Where did you see him?

A. I saw him in Huron.

Q. You also saw him at Deadwood?

A. Yes, sir.

Q. And also in the penitentiary?
A. Yes, sir.
Q. You have seen Wallace three times since that day?
A. Yes, sir.
Q. Baxter you never have seen?
A. I ain't never recognized him.
Q. You have never been able to recognize the man who sent the package?
A. No, sir.
Q. Didn't you go to the penitentiary for the purpose of ascer— whether you could recognize him there?
A. No, sir.
Q. You were at Deadwood at the time of the conviction of these three men?
A. Yes, sir.
Q. You were still unable to identify Baxter?
A. Still unable to identify Baxter.
Q. So far as you are able to testify, you never have seen Baxter or the person who represented himself to be E. Baxter since your transaction with him on the 8th day of June, 1896?
A. Yes, sir.
Q. You say, "Yes, sir"?
A. I have never recognized him; no, sir.
Q. You say he gave his name as E. Baxter?
A. Yes, sir.
Q. And not as Ed. Baxter?
A. No, sir.
Q. You say that package done up in a shoe box, weighing two pounds and a half, received from Baxter, left Gettysburg about 3.45 on the morning of the 9th?
A. Yes, sir.
Q. Do you know that to be so?
A. No, sir.
Q. From your own knowledge you cannot testify that that package ever left Gettysburg?
A. No, sir.
91 Q. So you were mistaken when in response to a question by the district attorney you stated that it left Gettysburg at 3.45 on the morning of the 9th?
A. He asked me what time it would leave there, and I said 3.45.
Q. You were not there when the train left on the morning of June 9th, 1896?
A. Not that I recollect of.
Q. Did you have an assistant?
A. I did (or didn't).
Q. Did you have any one who attended to the matter of shipments at that time?
A. Yes, sir.
Q. Then you had somebody assisting you?
A. Yes, sir.

Q. You then have no independent recollection of shipping this package?
A. I have no recollection of putting it on the train.
Q. That would be shipping it, wouldn't it?
A. Yes, sir.
Q. These two men came in there together?
A. Yes, sir.
Q. How long were they there?
A. Probably five minutes; just long enough to do their business.
Q. You weighed this package?
A. Yes, sir.
Q. You have distinct recollection of weighing it, and it weighed two pounds and a half?
A. Yes, sir.
Q. Of course, you didn't know what was in the package?
A. No, sir.
Q. They didn't tell you what was in the package?
A. No, sir.
Q. Do you remember who the order was made payable to, or was it made payable to anybody?
A. I don't. It was made payable to a certain party.
Q. You don't remember who it was made payable to?
A. I don't remember; no, sir.

Redirect:

Q. What did you do with this package when you billed it? Where did you place it?
92 A. It was left in the office for the party to put on the morning train that made the morning train.
Q. Had you a certain place to put packages for the morning train?
A. Yes, sir.
Q. In the regular course of business it would have been shipped on that train, would it?

Defendant objects upon the ground that it is incompetent, irrelevant, and immaterial.
Objection by the court overruled; to which ruling defendant excepts, & exception allowed.
18th exception.

A. Yes, sir.
Q. Was it there the next morning?
A. It was not.
Q. You haven't seen it since that time?
A. No, sir.

By Mr. AIKENS:

Q. Well, I suppose sometimes the messenger comes in and gets the packages himself?
A. Yes, sir; sometimes.
Q. You leave the door open?

A. No, sir.
Q. He has a key?
A. No, sir.
Q. How does he get in?
A. He gets in when we unlock the door.

Witness excused.

L. S. TYLER, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. L. S. Tyler.
Q. Where do you reside?
A. Sioux Falls, South Dakota.
Q. What is your business?
A. Agent for the American Express Company.
Q. In charge of the office at this place?
A. Yes, sir.
Q. How long have you been such agent?
A. Three years—a little over.
93 Q. And you occupied that relation to the express company in June, 1896?
A. I did.
Q. What, if any, record have you of the receipt of express packages consigned to parties in Sioux Falls on the 9th day of June, 1896?
A. I have a sheet.

Witness' attention is called to Plaintiff's Exhibit "O," the same being line numbered "30," together with the printed headings at the top of the columns, and asked if that record is made in the ordinary course of business in your employment.

PL'FF'S EX. O, F. R. S.

(215.) No. 238.

SIOUX FALLS OFFICE, S. D., *June* 10, 1896.

Received of American Express Company the following articles in good order at ——:

Waybill.		From—		Articles.	Marked to contain—		Consignee.	Destination.	Weight.	Advanced charges.
No.	Date.	Office at—	State of—		Dolls.	Cts.				
92	— 9	Gettysburg.	S. D...	Pa.	.....	.....	Mr. Joe Kirby.	..	2½	

Defendant's counsel objects upon the ground that it is incompetent, irrelevant, and immaterial.

Objection by the court overruled; to which ruling defendant excepts, and exception is allowed & read in evidence, copy of which is attached to this page.

19th exception.

A. Yes, sir.

Q. And is there such a record made of all packages that are received consigned to this city?

A. There should be; yes, sir.

Q. Calling your attention to that exhibit, I will ask you if that entry was made at the time of the delivery of the package described in it.

A. I didn't make this record myself.

Q. You are the manager?

A. Yes, sir.

Q. Who made that record, if you know?

Q. I should say that was the clerk's handwriting.

Q. Who was the clerk?

A. His name is Tyler; my son.

Q. He was clerk there at that time?

A. Yes, sir.

Q. And it was his duty to make that entry?

A. Yes; we both make these records, and when I haven't time he does. We change off in that way.

94 Exhibit "O, F. R. S.," is offered in evidence.

Defendant objects to the reception of Exhibit "O" for the reason that there is no foundation laid for the evidence—incompetent, irrelevant, and immaterial, not such a record as is recognized by law as evidence, and especially against this defendant in this court—and for the further reason that it does not correspond with the evidence given of the express package at Gettysburg.

By Mr. ELLIOTT: I will call the court's attention, regarding the last part of the objection, that the "F" and "7" are blended together, making it look like a "2."

Objection by the court overruled; to which ruling defendant excepts, and exception is allowed.

By the COURT: This, of course, don't carry with it that signature of "Joe Kirby" there.

20th exception.

Q. I think I understood you to say that you had no independent recollection of this package?

A. I have not.

Q. Is there any mark there that you recognize as that being the original waybill that came with the package, as Exhibit "O"—check-mark or other mark?

A. No, sir; not any.

Q. You have no check-mark?

A. I have a check-mark—yes—but I have no check-mark on that bill.

Q. Can you state of your own knowledge to whom that package was delivered?

A. I cannot; no, sir.

Q. In the usual course of business how would that package have been delivered, consigned as that package was, in Sioux Falls?

Defendant's counsel object upon the ground that it is incompetent, irrelevant, and immaterial.

95 Objection by the court overruled; to which ruling defendant excepts, and exception is allowed.

21 exception.

Q. By whom and in what manner?

A. After receiving these packages and writing them up on the book, sometimes deliver them ourselves—whoever is in the employ of the company at the office—but a great majority of them are turned over to the driver, whose duty it is to deliver the packages, get receipts, and collect the money.

Q. I will ask you if there is anything in that line that would indicate how this was delivered.

Defendant's counsel objects for the reason that it is irrelevant, incompetent, and immaterial; not the best evidence.

Objection by the court overruled, to which ruling defendant excepts.

Exception allowed.

22nd exception.

Q. Whether by the carrier or at the office?

A. By the driver; checked to him.

Q. Do you know who the delivery clerk was at that time?

A. W. G. Nicoli.

Q. And it was to him that this was delivered?

A. Yes, sir; according to the check-mark there, it is.

Cross-examination by Judge AIKENS:

Q. Mr. Tyler, you don't know, do you, that that was delivered to Nicoli?

A. No, sir; I don't, positively.

Q. You don't know that you ever received the package
96 mentioned in that original waybill, do you, at your office?

A. Why, I don't know positively.

Q. There is no distinguishing check-mark on there made by you, you say?

A. No, sir.

Q. This is all the record you have of receipts on that day of packages?

A. I have another sheet of that day, but it does not come in. I have another sheet for packages.

Q. Have you any distinct recollection of having received that day the package No. 97; have you any record of it?

A. Well, packages would not be numbered.

Q. Have you any record of it in your office?

A. Nothing but this.

Q. You say it is number "30" here?

A. Line "30."

Q. What number corresponds with that?

A. Corresponds with the number of the waybill.

Q. Yes, sir; that is number 92. Now, do I understand you to say that there were no check-marks on Exhibit "O" made by you?
A. No, sir; not any made by me.
Q. Then you have no personal knowledge of anything connected with this package at all?
A. No, sir.
Q. Do you know the method or manner in which the packages or express matter is shipped from Gettysburg to Sioux Falls?
A. I think I do.
Q. Where would it first change hands, if at all?
A. From the consignee's hands into the agent's hands; from the agent into the messenger's hands, unless there was a transfer man; then it would go to Redfield; then it would be possible to pass through two or three hands—possibly might not pass through but one; from there to Salem; there it might pass into the
97 agent's hands; from there it would come to Sioux Falls, and it might pass into the hands of three men here before it would get to the consignee.
Q. It would not, in the ordinary course of business, be in the possession of one man from Gettysburg until it got into your office?
A. Possible to be in the hands of from three to eight.
Q. It would not be in the hands of one man in the usual course of business?
A. No, sir.

Witness excused.

W. G. NICOLI, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. William Nicoli.
Q. Where do you reside?
A. Sioux Falls.
Q. How long have you lived here?
A. About seventeen years.
Q. What is your business?
A. Driving—delivering for the American Express Company.
Q. How long have you been so engaged?
A. A year ago the 9th of last April.
Q. You were then following that vocation in June, 1896?
A. Yes, sir.
Q. As such delivery clerk, what, if anything, have you to do with consignments of express to persons in Sioux Falls, or did you at that time?

Defendant's counsel objects for the reason that it is incompetent, irrelevant, and immaterial.
Objection by the court overruled; to which ruling defendant excepts, and exception is allowed.
23rd exception.

98 A. Why, the goods are checked out to me, or I check them out myself; all goods that I can deliver; check them off from the sheet that is handed to me.

Q. Your attention is called to Exhibit "O," and you are asked if that is the sheet you refer to?

A. Yes, sir. That is my check-mark.

Q. And you made it?

A. Yes, sir.

Q. State, if you know, what, if anything, you did with the express package there named.

A. According to my check-mark——

Defendant's counsel object to anything except the witness' knowledge as incompetent, irrelevant, and immaterial. Objection by the court overruled; to which ruling defendant excepts, which exception is allowed.

24th exception.

A. I delivered it.

Q. To whom?

A. At Kirby's office.

Q. Did Mr. Kirby reside in Sioux Falls at that time, do you know?

A. I think he did.

Q. Had he an office here?

A. Yes, sir.

Q. Where was that office?

A. In the Hollister-Beveridge block.

Q. You had delivered other packages there prior to that time?

A. Yes, sir.

Q. And this was delivered in the usual course of business?

A. Yes, sir.

Q. State, if you known, whose signature this is.

A. No; I could not.

Q. Do you know who signed that?

99 A. Why, there is three different parties who sign that book there.

Q. In the office?

A. Yes, sir.

Q. Can you state whether or not that was signed at the office at the time of the delivery?

A. That is too far back.

Cross-examination by Judge AIKENS:

Q. Well, Mr. Nicoli, you cannot swear positively as an independent fact that you ever had this package referred to on this paper, or that you ever delivered it to Kirby or his office, as an independent fact?

A. Well, I will state this, that I must have or I would not have checked it.

Q. If it were not for this record you would not have any recollection of it at all?

A. No, sir.

Q. Now, does this record that your attention has been called to here refresh in any manner your memory as to the delivery of this particular package—it doesn't aid you at all?

A. No, sir; I don't have no recollection only what the record shows there.

Q. Sometimes you take packages out and bring them back without delivery even to people in town who have offices?

A. Yes, sir.

Q. That check is made when you put it in your wagon?

A. Yes, sir.

Q. You don't remember of ever having left this package at Kirby's office?

A. No, sir.

Redirect examination by Mr. ELLIOTT:

Q. If you had returned this package back to your office would this receipt have been signed?

A. No; not unless he got it the same day.

100 By Mr. AIKENS:

Q. Now, you say he either got it at the express office or it was delivered to him?

A. He either got it at the office or it was delivered to him.

Q. You depend upon your record solely in coming to that conclusion?

A. Yes, sir.

Witness excused.

M. C. FOSNESS, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?

A. M. C. Fosness.

Q. What, if any, official position do you hold?

A. Post-office inspector.

Q. How long have you been such inspector?

A. Six years and a half.

Q. Are you acquainted with the defendant Mr. Kirby?

A. Yes, sir.

Q. Did you know him in June, the first of June, 1896?

A. I have known Mr. Kirby three or four years.

Q. Where did he reside at that time?

A. In the city of Sioux Falls.

Q. You know whether or not he kept an office at that time in the city?

A. Yes, sir.

Q. What was his business?

A. He was a lawyer.

Q. And where was his office?

A. I think they call it the Beveridge-Hollister block. It is on Ninth street between Main and Phillips avenues.

Q. I will ask you if you know the persons named in this indictment as Wallace, Baxter, and King.

A. I do.

101 Q. When and where did you first see them?

A. *A* I saw Baxter and King in the town of Mitchell on the 15th of June, last year. Wallace I first saw on the 18th or 19th of June in the town of Huron, this State, last year.

Q. Under what circumstances did you see them at Mitchell?

A. They were in jail the first time I saw them, in the custody of the sheriff.

Q. Under what circumstances did you see Wallace?

A. Wallace was in the custody of the deputy marshall at Huron.

Q. When did you next see them?

A. I saw them in Huron again, on the 25th and 26th of June, at an adjourned preliminary hearing; saw them at Deadwood again in September; seen them at least twice in the penitentiary here.

Q. You know of the fact of the post-office robbery at Highmore on the 7th of June, 1896, do you?

Defendant's counsel object upon the ground that it is incompetent and immaterial. Objection overruled. Defendant excepts. Exception allowed.

A. Yes, sir.

Q. When did you first learn of that fact?

A. The next Wednesday morning. I got a telegram at Aberdeen.

Q. What, if anything, did you do in pursuance of your duties as inspector in relation to that robbery?

A. I proceeded to the town of Highmore and investigated the case.

Q. From there where did you go?

A. I went West from there to the town of Blunt and to Pierre, and from Pierre I went to Mitchell.

Q. From Mitchell where did you go?

A. I came to Sioux Falls to consult the United States

102 attorney.

Q. What, if anything, did you do with relation to the allegations of this indictment after you got here?

A. I swore out warrants for them under the direction of the United States attorney.

Q. What, if any, transaction had you with this defendant?

A. I went to his office to see him on the 2nd day of July.

Q. State just what was said and done, fully.

A. I called at Mr. Kirby's office somewhere about half past ten in the forenoon. I said I came to see him about an express package sent to him on the 8th of June from Gettysburg. Mr. Kirby said "Yes" in a quiet tone. I said it was sent by men under arrest for breaking into the Highmore post-office, and that it was sent at the

first opportunity, and I supposed it contained the Highmore post-office stamps stolen from the Highmore post-office.

Q. What was his reply?

A. He kind of waited and said, "Well, what do you want to know about it?" I said I wanted to know who sent the package, and if it contained the postage stamps I wanted them. He said he didn't know as he could tell; that the question of attorneyship and professional confidence came in. I said that that question could not arise in the case; that the men had not been arrested when they sent the package. He said, Of course, I understand that I cannot be general attorney for a criminal, but there is something back of it if it is the men I think it is. I insisted on my point that the question of professional confidence did not apply to the case. He said he would have to study about it, but he was inclined to think the court would sustain him in refusing to testify, and he spoke of these men being dangerous characters and they might make an animated target of him.

Q. Animated what?

A. Animated target was the expression he used, meaning,
103 of course, that they would shoot at him. He asked who knew about the thing. He said, of course, there was no wrong in it, but it might not look well. I told him I didn't tell any one myself except in the line of investigation at Huron at the preliminary hearing. Finally he asked if he could see the men; said he would like to see them; see if he knew them; and it was arranged that we should meet at the sheriff's office. They were then in town, these three men. He said he would like to see them and I arranged to see them at the sheriff's office after dinner. He was there and I was there and Mr. Kirby went into a back office—a back room—and stood by a window, and the men were brought in from the jail and he looked at them through the window and they were brought back again, and he said he thought he knew one of them, Baxter, the middle man. He didn't call him by name. He thought he knew him, but wasn't sure about him.

Q. He didn't call him by name?

A. No, sir.

Q. That man is known by what name?

A. That is Baxter. He said then before going further he would like to see Mr. Miller, the United States attorney. I told him Mr. Miller wasn't in town. Then he said, I will see Van, the assistant attorney.

Q. Meaning Mr. Van Buskirk?

A. Yes, sir; he mounted his bicycle and came up to this building and I came on foot following him. He was in Mr. Van Buskirk's office when I arrived and they were talking about the package. I joined in the conversation. Mr. Miller came in. He came from Elkpoint unexpectedly, as I understood him. He joined in the conversation.

Q. Will you state what that conversation was?

A. It related to the express package. He again used the term

animated target, and he said if they should think he delivered
104 up the package voluntarily it would involve some danger to him.

Q. What, if anything, further?

A. He proposed a search warrant to obtain the package, and I assented. Then he suddenly thought it would be a matter of public record, and said, "I don't want that." And then he suggested some pretended search warrant; something that I could swear to in court that would not implicate him. I told him I would not swear to anything of a ficticious character. Then I made a counter-proposition finally that I would call at his office as postal inspector and demand the package, and so testify in court as to how I obtained them. Mr. Miller he turned to Mr. Kirby and said, "What was in the package, anyhow?" Mr. Kirby turned to me and said, "It's what he wants; what he is looking for."

Q. Well, what further was said after this agreement was reached?

A. Well, some general conversation occurred. Kirby related a little experience in hypnotism made by him; something outside.

Q. Have you stated now all that you remember?

A. Yes; in a general way, all that occurs to me now.

Q. What, if anything, was said as to the time you were to go and make this demand?

A. I agreed to call at the office at eight o'clock that same evening. I did call at his office at eight o'clock in the evening; found Mr. Kirby there alone, evidently waiting.

Q. At his office where?

A. At his law office in Sioux Falls, South Dakota. He said, "Good evening," and I said, "Good evening," and he asked what I wanted or what he could do for me this evening, and I said I came to search for and demand certain postage stamps which I believed to be in his room. He said, "Yes; where would you like to look?" I said, "Naturally, the first place, in your safe here." He said,
"Very well," and got up and turned a knob and swung the
105 door open, and I stepped up in front of the safe, and as there were a good many pigeon-holes I hesitated where to begin to look for what I wanted, so he got up and pointed to a certain roll, newspaper package, and said, "That is what you want."

Q. A roll covered with newspaper?

A. It was a newspaper roll or package.

Q. He said what?

A. He said, "That is what you want," pointing to it.

Q. What did you do then?

A. I took it out of the safe and unrolled it, and there was the postage stamps in it.

Q. Have you that package with you?

A. No; it is in the custody of the clerk. I have a list of the stamps that was in the package.

Q. (Package handed to witness.) That is the package that you received at that time?

A. To all appearances.

Package offered in evidence.

Q. What, if anything, did you do with these stamps?

A. After I opened the package we went into Mr. Kirby's private office and counted them; we went in together.

Q. Have you a memoranda made at that time?

A. Yes, sir.

—. You may produce it.

Witness does so.

(WITNESS:) I can give the number of stamps in the package from memory.

Mr. ELLIOTT: You may do so.

(WITNESS:) There were 1,266 one-cent stamps, 5,050 two-cent stamps, 140 four-cent stamps, and 150 five cent stamps; total value was $126.76.

Q. You are shown Plaintiff's "Ex. P, F. R. S.," and asked if that memoranda was made at the time the stamps were counted.

A. Yes, sir.

106 Q. By whom?

A. By myself.

Q. In whose presence?

A. In Mr. Kirby's presence. I can explain the "O. K." that appears on that memoranda. I verified the count the next morning.

Exhibit "P" offered and received in evidence without objection.

PLAINTIFF'S EXHIBIT "P," F. R. S.

Joe Kirby, counselor-at-law, 1, 3, 5 Hollister-Beveridge bl'k, Sioux Falls, S. D.

1's	12.66	O. K.
2's	101.00	O. K.
4's	5.60	O. K.
5	7.50	O. K.
	126.76	

(On reverse side of sheet.)

13.647–D.

Original mem. of count in office & presence of Joe Kirby, evening of July 2, '96.

Q. What, if anything, further was said and done that evening at that time?

A. Mr. Kirby said, after he had delivered up the stamps, "You people"—I suppose he meant the attorney and myself—"have treated me well in this." He said, "You might have made me some trouble. Of course, I could clear myself, but I don't want the

107 notoriety of it." And he asked me to call on the prisoners and tell them he delivered up the package under compulsion,

which I did the next morning. We had some general conversation. I was there some fifteen or twenty minutes. I remember he took a pistol out of his drawer and showed me, for one thing, and asked me what kind I carried.

Q. You took these stamps with you at that time?

A. Yes, sir.

Q. What, if anything, further was said and done at that time?

A. That evening?

Q. Yes, sir.

A. Nothing occurs to me particularly. I had quite a conversation.

Q. When did you next see him?

A. Saw him the next morning.

Q. What, if anything, was said as to the stamps?

A. I told him that the stamps turned over by him did not agree fully with the losses from the Highmore post-office and I supposed it had been mixed with some other lots. He said, "Oh, no;" and I asked him just what he wanted me to tell the men about the stamps having been given up by him. He said to use my own judgment; no particular phraseology to suggest. I went down to the jail and saw the men.

Q. You know the amount and denominations of the losses at Highmore, do you?

A. Well, I know from the postmaster's statements.

Q. What, if anything, further was said?

A. In the evening I asked him for another package received by him from these same men.

Defendant's counsel object to any conversation regarding any other package, as irrelevant to the issues in this case. Objection by the court overruled; to which ruling defendant excepts; which exception is allowed.

25th exception.

108 A. In the evening after he delivered this package to me, I said, "By the way, Mr. Kirby, while I am here and while the subject is up, I may as well ask you about the two other packages that you received from these men from Aberdeen just after the post-office robberies at Miller and Waubay." He seemed considerably surprised by the question, and he said, "Give me the dates, please, of these packages." I did give him the dates, and he made a note on a piece of paper of these packages. I asked him what was in these packages. He said he didn't know. I said, "They came to you; were sent to you." He said he didn't open these packages, and I said that immediately following one of these packages a registered letter was sent to Whalen by a man by the name of W. J. Burke, "for whom you rented a post-office box." He said, "Yes." I said, "It seems that no mail has ever come to that box." He said, "Yes; some mail has come to it; two letters have come to the box." I questioned him again as to the contents of these two other packages and he protested he didn't know; he didn't open them.

Q. What, if anything, further was said that visit?
A. I can't recall anything.
Q. You can't recall anything now?
A. No; I was in his office very nearly an hour.
Q. When did you next see him and have any conversation with him?
A. I saw him the next morning.
Q. This was in the evening?
A. Yes, sir.
Q. Up to the time that he delivered this package had anything been said about the other robberies?
A. Nothing whatever until I gave him the receipt for the stamps, and it was then that I spoke of the other packages after I had these in my possession.
Q. You may state what was said and done the next morning.
109 A. I returned to his office the next morning, and I said the stamps that I received didn't agree with the stamps stolen from Highmore.
Q. What, if anything, further was said then?
A. Nothing further.
Q. You think of nothing further?
A. No.
Q. You think of nothing further?
A. When I mentioned the name of Burke; I said, "You rented a post-office box in the name of Burke." He said, "Yes; that is the man I was referring to." I saw Mr. Kirby again on the 11th day of August, last year, and made a demand on him to make the losses good for these various robberies, and he declined to do so.
Q. What, if any, conversation had you then relative to these postage stamps here?
A. They were not especially mentioned. We spoke of the various losses. I told him I had a list itemized and could show it to him.
Q. State what he said.
A. He declined to talk about it.

Cross-examination by Judge AIKENS:

Q. Mr. Fosness, where do you reside?
A. Des Moines, Iowa.
Q. How long have you lived there?
A. Six years and over.
Q. You say you have been in the service of the Post-office Department for six years and a half?
A. Very nearly.
Q. As inspector all the time?
A. Yes.
Q. As inspector what are your duties?
A. My duties are very numerous indeed; in all matters pertaining to postal service; might say a thousand things.

Q. I would like to have you relate them.

A. Investigate robberies; recover losses——

Q. You belong to the secret service as well as an inspector?

110 A. No secret service about it.

Q. Are you a detective by virtue of your office?

A. No, sir.

Q. You investigate, you say, post-office robberies?

A. Yes, sir.

Q. What do you mean by that?

A. Determine the circumstances and amount of loss, and, if possible, follow up and cause the arrest of the burglar; recover the loss, if possible.

Q. Recover the loss to the Government, if possible?

A. If possible.

Q. That is a part of your duty?

A. Yes.

Q. You say that on Wednesday immediately preceding, or rather immediately subsequent to the robbery at Highmore, you received notification by telegraph to investigate?

A. At Aberdeen, I received a telegram.

Q. Well, it was immediately?

A. Wednesday morning.

Q. And ever since that time you have been investigating that case, haven't you?

A. Spent considerable time, of course.

Q. You have been investigating it ever since, haven't you?

A. No, sir; there have been a good many cases since.

Q. You testified in this case upon the last trial, didn't you?

A. Yes, sir.

Q. Have you a memorandum that you have been referring to there, from which you have been testifying?

A. I have.

Q. The same memorandum that you referred to to refresh your recollection at the other trial?

A. The same; yes, sir.

Q. You are guided now, as you were then, whenever your recollection is at fault, by that?

A. It is the same memorandom.

Q. The same memorandum that you referred to before when you testified?

A. Yes, sir.

Q. When did you first remember the occurrence or statement of Kirby that you folks might have made him a great deal of

111 trouble if you had been a mind to do it?

A. I didn't say a great deal of trouble.

Q. When did you first think of that?

A. Ever since that evening.

Q. Did you testify to it at the last trial?

A. I don't know whether I did or not.

Q. You pretended on the last trial to give all the conversation that occurred?

A. No, sir; I could not do it now. I was in his office an hour in the evening, and in the sheriff's office and here, and could not pretend to give all the conversation that occurred.

Q. You mean to say, Mr. Fosness, that you cannot give all the conversation that occurred on the 2nd day of July in his office in relation to the stamps?

A. I can give the substance of it.

Q. That is, you mean to say that you can give that portion of it that you want to give?

A. The main points.

Q. That is what you mean by "the substance," is it?

A. Substance of the conversation.

Q. There might have been a great many things said by Mr. Kirby in relation to these stamps that you don't remember.

A. I think not.

Q. Could there have been one material thing—any one material thing—about it that you do not remember; that would be impossible?

A. No.

Q. When did you first think to testify that he pulled a pistol and asked you what kind you carried?

A. I thought of it here.

Q. You didn't remember that at the last trial?

A. I don't think I did; no.

Q. I suppose that was a pretty ugly pistol?

A. No; I am not a judge of pistols.

112 Q. You were not afraid of him?

A. No, sir.

Q. There was nothing in his conduct that would lead you to be afraid?

A. No.

Q. You thought that was a material part of the conversation in regard to the stamps?

A. It was a circumstance.

Q. When did you first call to mind the fact that he would like to have you go down and tell the men in jail that he was compelled to give up the stamps?

A. Ever since that time.

Q. You didn't testify to it the last time you was on the stand?

A. I don't know as I did; don't know as I didn't.

Q. You told him that you would?

A. I did.

Q. And you did do it?

A. Yes, sir; I did.

Q. Is that a part of your memorandum?

A. I don't know whether it is or not.

Q. You may look and see. (Witness refers to memorandum.)

A. No, sir; it is not.

Q. Have you anything in your memorandum that you haven't testified to?

A. I don't know.

Q. Will you let me see it?

A. Yes, sir; you may, if you want to; if the district attorney is willing.

District attorney objects to defendant's counsel inspecting memorandum, without it is read to the jury

Q. When did you make that memorandum?

A. On the 12th day of October last.

Q. This conversation that you had was on the 2nd day of July?

A. Yes, sir.

Q. You made this on the 12th day of October?

A. 12th day of October.

Q. That was after the indictment was returned against
113 these three men?

A. Yes, sir; after they were convicted and after Mr. Kirby was indicted.

Q. Then you made this memorandum to refresh your recollection upon the trial of this case?

A. Yes, sir; I made it to use.

Q. Now, Mr. Kirby, you say hesitated; how long did he hesitate when you first made the proposition on the 2nd day of July, in his office?

A. In answer to my question?

Q. Yes, sir.

A. He leaned back in his chair; I could not say how long.

Q. How long?

A. Probably half a minute—a minute.

Q. Acted like a guilty man, didn't he; that is what you mean to convey to the jury—he hesitated?

A. He hesitated.

Q. He acted as though he was wonderfully suprised?

A. Yes, sir; he was suprised; very much so; no doubt about it.

Q. Did you make that a part of your memorandum?

A. I don't know whether I did or not.

Q. Don't you know?

A. I can look.

Q. Just see if you did? (Witness refers to memorandum.)

A. Yes, I did.

Q. Did you state in your memorandum how long he hesitated?

A. I did not.

Q. Did you make a minute there of the impression it made on your mind?

A. No, sir.

Q. He hesitated, then what did he say?

A. He said he didn't know as he could tell me; that there was a question of attorneyship involved; a question of professional confidence.

Q. Did he tell you between whom?

A. He didn't, except subsequently. He employed the
114 statement "if it was the man he thought it was."

Q. Didn't he disclose who the man might be?

A. No, sir; he didn't. When Burke's name was mentioned, then he said, "That is the man I referred to."

Q. Did he refer to any other man?

A. No, sir.

Q. You understand Burke was the man he meant?

A. That was what he said in the evening.

Q. Well, how long did you stay in there before you went down to the court-house?

A. Went down just after dinner; went down separately.

Q. What time were you in his office?

A. Somewhere between ten and eleven o'clock.

Q. How long did you stay when you first went in?

A. I could not say; perhaps half an hour.

Q. Have you got any memorandum?

A. No, sir.

Q. It might have been what?

A. Might have been a half hour.

Q. You went to your dinner?

A. Yes, sir.

Q. Made an appointment with him to meet at the county jail?

A. At the office of the sheriff.

Q. Well, he was down there?

A. I think he was there ahead of me.

Q. He went into a side room in which there was a window, and the prisoners were taken through another room and he had a view of them?

A. Yes, sir.

Q. And after they had passed in procession before him and yourself——

A. I wasn't in the room with Kirby.

Q. You were in the room with the prisoners?

A. I was in the sheriff's private office.

Q. He told you he thought he recognized the middle man, which you say was Baxter, but he wasn't sure of it?

A. Yes.

115 Q. Got that on your memorandum?

A. I think I have.

Q. Then, immediately after that meeting there you went to his office?

A. No, sir; came right up to this building.

Q. He had told you before that that he would like to see Mr. Miller?

A. Yes, sir.

Q. You told him that Miller wasn't in town?

A. Yes, sir.

Q. Then you told him about seeing Mr. Van Buskirk?

A. Yes, sir.

Q. Where was this arrangement made that you should meet him at the district attorney's office?

A. There was no special arrangement made. I followed him up from the sheriff's office.

Q. You don't remember, then, whether he requested you to come up here or not?

A. No, sir; it would not have made any difference whether he requested me or not.

Q. I wasn't asking about that. Of course, I know it wouldn't. You met up here in the district attorney's office?

A. Yes; I followed him.

Q. That was about what time in the afternoon?

A. About two o'clock; in the early afternoon.

Q. Who was in the office when you came up here?

A. Mr. Van Buskirk and Mr. Kirby.

Q. And what transpired between you three?

A. We had a conversation about the express package.

Q. Can you remember what it was?

A. Only in a general way.

Q. That is, from what your idea of what the substance was, as you remember; what you think is material. Is that what you mean to say?

A. I mean the general substance.

Q. You may state just exactly what it was; just exactly what you said; what Kirby said and what Mr. Van Buskirk said.

A. They were speaking of the package when I came——

Q. State what they said.

116 A. I could not recall the exact words used.

Q. Is all that you can testify to the impression it made upon you?

A. I know what they said. Kirby spoke of these being dangerous characters, and that he was afraid of them, and that he wanted some show of compulsion to surrender the stamps.

Q. Did he state that to you?

A. That was to both of us. I think he spoke to me mainly. Spoke of having a search warrant.

Q. What did he say about it?

A. He said it would be a matter of public record and said. "I don't want that."

Q. What did he say?

A. He said he might get out a search warrant.

Q. You might get out a search warrant?

A. He suggested that; yes, sir; to get the stamps.

Q. What did you say?

A. I said, "Very well." I assented. Then he said it would be a matter of public record and he didn't want that. Then he said, "Put up some pretended process;" something that I could testify to; which I declined to do.

Q. Van Buskirk was in the room?

A. Yes.

Q. How large an office is it?

A. It is an ordinary office; two rooms connected.

Q. What else occurred?

A. Then I proposed that I would call at his office in the evening and demand the stamps as postal inspector and so testify.

Q. And he agreed to that?
A. Yes, sir.
Q. He agreed; you don't know what he said? Isn't it a fact that you don't remember the exact words used?
A. Yes; I remember some of the words, I think.
Q. There was one word that you remember, "animated target"?
A. Yes; he used that twice.
Q. Can you remember any other word that he used?
117 A. Yes, sir; he said it was a question of attorneyship that prevented him from——
Q. That you remember?
A. Yes, sir.
Q. He never at any time said that he would not give you the stamps?
A. No; not in express terms.
Q. He never refused to give you these stamps, did he?
A. No, sir.
Q. Down from the time you went into his office, on until you came into possession of these stamps, were you not engaged in negotiations with him by which you were to obtain them; wasn't it all the while a negotiation to get these stamps?
A. No; not all the while. I didn't see him from three o'clock until eight in the evening.
Q. Was there any time that he refused to turn these stamps over to you?
A. No, sir; not in express words.
Q. And he did turn them over to you?
A. Yes, sir.
Q. There they are; those are the stamps?
A. Yes, sir.
Q. Were they in this newspaper? Look and see.
A. Yes; that is the newspaper.
Q. And you and he sat down in his office—that is, you went into his private office to make out an inventory of these stamps?
A. Sat at his desk.
Q. You counted them over there?
A. Yes, sir.
Q. In his presence?
A. Yes, sir.
Q. He was there all the time?
A. Yes, sir.
Q. It was eight o'clock in the evening?
A. It was eight o'clock when I went in.
Q. When did you leave?
A. It must have been half past eight; perhaps quarter to nine.
Q. And he witnessed the counting?
A. He sat looking on.
Q. Acquiesced in it?
A. Yes.
118 Q. And the result was that before you got through your business with him he asked you to give him a receipt?

A. I gave it to him.
Q. Did he draw it up?
A. He did.
Q. You signed it?
A. Yes, sir.
Q. A business transaction?
A. Yes, sir; it may be that I suggested the receipt.
Q. Don't your memorandum state?
A. It does not.
Q. Now, you and he were alone in that office that night?
A. Yes, sir.
Q. And was it while you were there alone that he showed you this pistol?
A. Yes, sir; nobody else came in.
Q. It was an ivory-handled pistol?
A. It was a wood handle.
Q. And he asked you what kind of a one you carried?
A. Yes, sir.
Q. Those were the words?
A. I think so. He says: "What kind do you carry?" Showed me the pistol.
Q. Now, you went around there the next morning, and you remember this inventory that you made, and it is just the same as you made the night of the 2nd——
A. That was the morning.
Q. You took that up into the office on the morning of the 3rd?
A. I don't think I had it with me.
Q. You went up the morning of July 3rd?
A. I think I did.
Q. What time did you go there?
A. About nine o'clock.
Q. You told him at that time that you had too many stamps for the Highmore post-office?
A. Too many two-cent stamps.
Q. You had 5,050, and you hadn't ought to have had but 3,700?
A. An excess of two-cent stamps.
Q. You asked him if he hadn't mixed them up with some other lot?
A. Yes.
Q. What did he say?
A. "Oh, no."
Q. Didn't admit that he had?
A. No.
119 Q. He didn't deny that he had?
A. Yes, sir.
Q. Told you that that was just as he got them?
A. He didn't say that.
Q. What did he say?
A. He said what I said, "Oh, no."
Q. Had he ever told you where these came from?
A. Told me they came from Gettysburg.

Q. Did he say so?
A. I don't remember that he said so in express terms.
Q. Did he ever tell you that these were received from Gettysburg?
A. I don't know that he did.
Q. Do you know that they came from Gettysburg?
A. I don't personally.
Q. Can you identify these stamps as coming from Gettysburg?
A. No.
Q. They didn't correspond with the stamps taken from Highmore?
A. The two-cent stamps didn't. The others did.
Q. You say the others did correspond to the Highmore loss?
A. In a general way; it is impossible to tell just exactly. I do know that the four-cent stamps corresponded to a cent with this loss from the Highmore post-office.
Q. Have you ever testified either before the grand jury or in this case as to the number of stamps that were taken from the Highmore post-office.
A. I may possibly.
Q. How many stamps did you get from Mr. Kirby of the one-cent denomination?
A. 1,266.
Q. How many was there lost from Highmore?
A. Well, it can only be approximated from the amount on hand at the end of the month. It would be about that many naturally.
Q. How many five-cent stamps did you get from Mr. Kirby?
A. 150.
Q. Is Mr. Howe the postmaster here, do you know, Mr. Fosness?
120 A. Right in the court-room now.
Q. I will ask you if you haven't asked him to testify that the losses from Highmore post-office corresponded with the stamps you got from Kirby.
A. I never did.
Q. Nothing to that effect?
A. Nothing whatever.
Q. Didn't you in your investigation of the loss at Highmore disagree with the figures of Mr. Howe?
A. No; I think not.
Q. Don't you remember?
A. I took his figures.
Q. Didn't you and he disagree as to the amount of loss from the Highmore post-office?
A. No.
Q. You never did?
A. No.
Q. Well, when you went back there on the 3rd of July what time was it?
A. About nine o'clock in the morning.
Q. You then at that time interrogated him in regard to some

losses that had been sustained by the Government at Waubay and Miller?

A. No; that was the evening before.

Q. On the 2nd?

A. On the 2nd.

Q. You had determined that you had too many stamps for the Highmore robbery?

A. I don't know as I had.

Q. You say you had to ask him a number of times whether he received express packages?

A. No; I only asked him once. I asked him several times what the packages contained.

Q. He told you in response to every one of these questions that he never opened the packages?

A. He never opened the packages.

Q. He never confessed that he received any packages from Miller and Waubay, did he?

A. He said he didn't know what the packages contained; hadn't opened them.

Q. He said that in response to every one of these questions?

A. He reiterated it.

Q. Now, what business had you with him when you went
121 up there on the morning of the 3rd?

A. Just what I said; I told him that there must have been a mixture of lots; and then I asked him what he wanted me to tell these men at the jail, and he said, Just give them to understand that the stamps were delivered up under compulsion.

Q. And from that time until the 11th day of August you didn't see him about this matter?

A. I don't remember that I did.

Q. On the 11th day of August you called on him?

A. It might have been on the 10th or it might have been on the 12th. My diary shows when I was here.

Q. You called on him armed with the figures as to the total loss of the robberies at Highmore, Miller, and Waubay?

A. Yes, sir; in the meantime I had recalled the papers from the department and had them with me.

Q. What did he say?

A. The first thing he said was, "I know what you want to see me about."

Q. After his refusal to settle the losses then this prosecution was begun?

A. Subsequent to it; necessarily.

Q. You have taken more than the usual interest in this case, haven't you?

A. No, sir; I haven't.

Q. You have taken no more interest than in the ordinary case?

A. I have taken the necessary interest in it.

Q. You feel satisfied that you have taken the necessary interest?

A. I feel that I have done my duty in it.

Q. Have you ever made use of any statement to any person that you would resign if you could not convict Kirby?

A. Never anything like it; no, sir.

Q. Did you receive instructions from the department to call upon Kirby to recompense the Government?

122 A. No specific instructions; these instructions are general.

Q. Then you didn't get any instructions from the department to demand payment of these losses from Kirby?

A. No, sir; I didn't.

Q. Then you acted upon your own judgment?

Counsel for prosecution objects that it is not proper cross-examination; immaterial. Objection overruled. Plaintiff excepts. Exception allowed.

A. I did.

Q. That was a part of what you considered your duty in the case?

A. It is a part of my duty.

Q. You considered it was?

A. I know it is.

Q. Suppose he had paid that, would you have prosecuted him?

Counsel for prosecution objects that that is not proper cross-examination.

Objection by the court sustained; to which ruling defendant excepts, and which exception is allowed.

26th exception.

Q. Did you have any instructions from the department in regard to that?

Counsel for prosecution objects. Objection by the court sustained; to which ruling defendant excepts, & exception is allowed.

27th exception.

Q. O, yes, you said, I believe, that when you came up here to the United States district attorney's office and saw Mr. Kirby here that he was telling some hypnotic story?

123 A. That was after he came. He told about hypnotizing an old Irish woman. He imitated her conversation and acted it out.

By Mr. AIKENS: I would like to have this witness identify that receipt.

Mr. ELLIOTT: That is the *the* original receipt marked Exhibit 1, & may be admitted in evidence without further proof; which receipt is read to the jury, as follows:

SIOUX FALLS, S. D., *July 2nd*, 1896.

Rec'd of Joe Kirby $126.00, stamps, believed by me to have been stolen from the Highmore post-office.

C. M. FOSNESS,
P. O. Inspector.

S. B. VAN BUSKIRK, called and sworn in behalf of the prosecution, examined by Mr. Elliott, testified as follows:

Q. What is your name?
A. S. B. Van Buskirk.
Q. Where did you reside in June, 1896?
A. In this city.
Q. What official position did you hold at that time?
A. I was assistant United States district attorney for this district of South Dakota.
Q. Who was the principal at that time?
A. Mr. Ezra W. Miller, of Elk Point.
Q. You have heard the statement of Mr. Fosness as to a conversation at your office?
A. Yes.
Q. What date was that, if you remember?
A. I could not fix the day of the month.

By Mr. AIKENS: We will admit that it was the 2nd of July.

(Witness continuing:) I remember the circumstance. It was some time along the first of July.
Q. You can identify it as the conversation to which he refers?
A. Yes.
124 Q. You may state what you know of that conversation.

Mr. Aikens ask- permission of the court to examine the witness, which is granted.

By Mr. AIKENS:

Q. Can you remember all the talk that took place?
A. Can I recall all that took place?
Q. All that was stated by yourself and Mr. Miller and Mr. Fosness.
A. I don't know as I could remember so that I could give it word for word.
Q. Would you be willing to testify that you can remember?

Mr. ELLIOTT: I object to that. All that is necessary is for him to be able to state the substance.

By the COURT: He can testify as to what he did hear. If he did, he can say so; can say what it was.

Objection sustained; to which ruling this defendant duly excepts & which exception is hereby settled & allowed.

28th exception.

& thereupon Mr. Elliott's last question, "You may state what you know of that conversation," was repeated.

WITNESS: Well, on the occasion to which Mr. Fosness alludes, in the afternoon somewheres—I should think, probably, about two o'clock—Mr. Kirby, the defendant, came into the office. Mr. Fosness hadn't got there and Mr. Miller wasn't there. He sat down and the matter of these postage stamps which had been taken from the Highmore post office was introduced, and in that conversation,

and, I think, before Mr. Fosness came in, Mr. Kirby said something about there might be a question of professional confidence or something of that kind. That was about the words that were used—"professional confidence." I replied to him that from what
125 I had learned I hardly thought that would apply. Presently Mr. Fosness came in and then the question arose as to the delivery of these stamps, and I remember that Mr. Kirby stated that he did not want it to appear that he voluntarily gave up the stamps, and presently Mr. Miller came in unexpectedly from Elk Point and he sat down. There was some little talk. Mr. Miller entered into it, and Mr. Fosness. I can't remember the details of it, because I didn't suppose that I would be called as a witness. However, Mr. Miller joined in the conversation. He says, "Well, Joe, what is in that package, anyhow?" I think that is about the expression. (Witness here describes the position of the parties in the room.) Mr. Kirby was sitting at the end. He says, "It is what he wants," "what he is after," or "what he is looking for." That is the language he used. We were talking about these stamps from Highmore, alleged to have gone into his possession.

Then there was some little talk and an agreement was made between Mr. Kirby and Mr. Miller that he would come down there and see Mr. Kirby before Mr. Fosness was to go down and see about the stamps, and Mr. Miller said to him that when he came down to supper he would see him, and I called Mr. Miller's attention to the engagement that he had made, fearing that he would forget, but whether he saw Mr. Kirby or not I do not, of course, know. I remember that it was arranged that Mr. Fosness should call on him that evening with reference to these stamps, and the arrangement was that Mr. Miller was to precede him.

Q. Do you remember anything further?

A. I don't recall it at the present time.

Q. Can you remember anything that was said as to getting out some sort of process?

A. There was some talk upon that subject, about getting out process, but I cannot remember.

126 Q. Can you state the substance?

A. I cannot remember distinctly.

Cross examination by Judge AIKENS:

Q. Think Mr. Fosness was there after Mr. Kirby went away?

A. No, sir.

Q. Mr. Fosness had been there some time before?

A. He had been in the office before. I have stated all that I know occurred in the presence of Mr. Kirby.

Q. You didn't hear Mr. Kirby propose that Mr. Fosness *out* up some sort of a pretended search warrant and go into court and testify to it?

A. I can't recall, except that he wanted it to appear that he was compelled to give up the stamps.

Q. Mr. Kirby came up there voluntarily?

A. All I know about it was that he came in alone and ahead of Mr. Fosness.

Q. Tell you what he came for?

A. Told me that he came on that subject.

Q. Isn't it a fact now, Mr. Van Buskirk, that when Mr. Miller, the United States attorney, asked him what was in the paper or package, didn't he say in response to that, "I think Mr. Fosness will find in there what he wants"?

A. I don't think it was.

Q. You are positive?

A. I am quite positive that he said the package contains what Mr. Fosness wants.

Q. That you are very clear about?

A. I feel very clear about it.

Q. That struck you; that made an impression upon your mind—the expression, "You will find there what you are looking for"?

A. Certainly.

Q. And you are positive that he didn't use the word
127 "think" at all?

A. I feel positive that he used the language I have stated; that it contained what Mr. Fosness was looking for.

Q. Mr. Miller, where is he now; do you know?

A. I suppose he is at Elk Point. I remember another subject that was spoken of; that was a little story that Mr. Kirby told.

Q. You remember that distinctly?

A. I cannot remember the details; I remember the circumstance.

Q. Did he say what men he was tied to with in a professional way?

A. I don't think he mentioned any professional man.

Q. He didn't name them?

A. He didn't name them. If he did, I don't recollect.

Witness excused.

Mr. THAYER testified on the part of the prosecution:

—. The train going west passed through Highmore on June 6th or 7th, 1896?

A. I can't swear positive; but I think it was about two o'clock.

Q. In the afternoon or morning?

A. Morning.

Q. How far is Blunt from Highmore?

A. 28 miles.

Q. On what road?

A. Northwestern.

Q. Is the train you speak of a passenger train?

A. Yes, sir.

Q. Regular passenger?

A. Yes, sir.

Q. Daily?

A. Yes, sir.

Witness excused.

Prosecution rests.

And thereupon the defendant moved the court as follows:

The defendant at this time moves to strike out all the testimony of the witness Howe, for the reason that it appears therefrom that it is not relevant to the issues in this case.

128 This is the witness who was an express agent at Gettysburg and who received a package from a party who gave his name as E. Baxter, and made out a waybill to him for that package, which is addressed to Mr. Joe Kirby, Sioux Falls, and this witness has not been able to identify the person convicted at Deadwood as being the person from whom he received the package, although he has seen him on two different occasions.

We also include in this motion to strike out his evidence the exhibit of the record kept by him as express agent at Gettysburg, and also the record of the express office at Sioux Falls, which has reference to the package received by him from E. Baxter, and whom he is unable to identify as being the person convicted of this offense.

Which motion was by the court denied, & to which ruling the defendant, Joe Kirby, then & there duly excepted, & which exception is hereby settled & allowed.

28th exception.

And thereupon defendant moves the court to strike out all the evidence of the witness L. S. Tyler in reference to the receipt at the Sioux Falls office of the United States Express Company of a package addressed to this defendant, for the reason that his evidence is irrelevant, he having testified that he has no knowledge of the receipt of the same, and for the further reason that there is a discrepancy which is not accounted for between the package shipped from Gettysburg and the package received at Sioux Falls, the discrepancy being in the number, the testimony of Mr. Howe being that it was number "97," while that of Mr. Tyler is that he only received a package the waybill for which was numbered "92."

129 Which motion was by the court denied, and to which ruling the defendant then & there duly excepted, and which exception is hereby settled and allowed.

29th exception.

Thereupon the defendant also moves the court to strike out all the evidence of the witness Nicoli, for the reason that the same is irrelevant, he having testified that he had no personal knowledge of the receipt at the Sioux Falls office of a package sent from Gettysburg, addressed to this defendant, and the only guide that he has is the record, and he admits upon the stand that the record does not assist him in refreshing his memory, and that he has no independent knowledge of the receipt of the package.

Which motion was by the court denied, & to which ruling the said defendant then & there duly excepted; which exception is hereby settled & allowed.

30th exception.

Thereupon the defendant moved the court to instruct the jury by advising them to acquit this defendant for the reasons:

First. That the indictment does not state facts sufficient to

constitute a public offense against the Government of the United States.

Second. That there is not sufficient evidence in this case that would warrant the jury in returning a verdict of guilty.

Which motion was by the court denied, & to which ruling the said defendant then & there duly excepted, & which exception is hereby settled & allowed.

31st exception.

1st. Thereupon the defendant requested the court to give to the jury the following instructions:

130 "You are instructed that in this case the defendant before proceeding to trial has entered a plea of former jeopardy, claiming that he had been placed on trial and in legal effect acquitted of this alleged crime of which he is now charged. Upon this plea the prosecution has not seen fit to take issue; therefore, for the purpose of this proceedings the truth of such plea, which the defendant has offered to verify, must be accepted. This being the condition of the case as now before the court, you are instructed to return a verdict finding all the issues upon the plea in favor of said defendant. In other words, you must find that the defendant has heretofore been placed in jeopardy of liberty and property upon this same charge. Having found as above, such verdict will, of course, be a bar to the present proceedings, and you are instructed to, in the present proceedings, on the plea of not guilty, to return a verdict of not guilty." Which requested instruction was refused by the court, and to which ruling the said defendant, Joe Kirby, then and there duly excepted, and which exception is settled and allowed; and

Thereupon the defendant requested the court *in* instruct the jury as follows:

The defendant in this case is charged with feloniously receiving and having in his possession with the intent then and there to convert to his own use and gain certain postage stamps alleged to be the property of the United States, he, the said defendant, then and there well knowing that said postage stamps had theretofore been feloniously stolen, taken, and carried away. In order to sustain this charge it is not sufficient on the part of the Government alone to show that said postage stamps may have been stolen, if you believe they were stolen, and that the same came into the pos-

131 session of defendant, but the defendant must, at the time he received such stolen property, if he did so receive it, have known that the same were stolen property, as charged in the indictment, and as the evidence in this case fails to show any such knowledge on the part of the defendant, you are instructed by the court to return a verdict of not guilty.

Which request was by the court refused, and to which ruling the defendant, Joe Kirby, then and there duly excepted, and exception is settled and allowed; and

Thereupon the defendant requested the court to give the following instruction to the jury:

32nd exception.

III. Recent unexplained possession by the defendant of stolen property may be evidence from which the jury would be justified in finding the defendant had committed the crime of larceny, but, in order to justify a verdict other than not guilty upon the charge in the indictment upon which the defendant is now on trial, it is necessary for the prosecution to show that the defendant had knowledge that said property had been stolen. The burden is on the prosecution to show such knowledge and not on the defendant to show the want of it.

Which request was by the court refused, and to which ruling the defendant, Joe Kirby, then and there duly excepted, and which exception is settled and allowed.

Thereupon the said defendant requested the court to give the following instructions:

33rd exception.

IV. In order to establish the crime charged in the indictment upon which this defendant is now on trial it is necessary for the prosecution not only to satisfy you beyond a reasonable
132 doubt that the property with which the defendant is charged with receiving was then stolen property, but it is likewise necessary for it to prove that the defendant had knowledge at the time he received it that such property was so stolen, and the prosecution must likewise satisfy you that the defendant received such property so stolen and with such guilty knowledge from the thief; and as the testimony of Mr. Howe, the express agent at Gettysburg, the one who claims one E. Baxter sent the package which the Government claims contained the stolen property, and as no attemps has been made by the prosecution to connect the said E. Baxter in any manner with the alleged theft nor to identify him as being the Ed. Baxter the record of whose conviction is set forth, and as the testimony of Mr. French likewise tends to show that a party named Baxter, other than the Baxter the records of whose conviction is before you, was at Gettysburg at the same time, and as the testimony of Mr. Fosness as to Mr. Kirby's statement in response to his or Mr. Miller's inquiry as to what the package contained merely stated that it contained property that Mr. Fosness was seeking for, and such statement, while it might tend to show Mr. Kirby's opinion then that he had the stamps stolen from Highmore, still it could not be taken as an admission that he had received such property from the thief, nor that he had at the time he received it any guilty knowledge of the theft of such property, and therefore you are instructed to return a verdict of not guilty.

Which request was by the court refused, and to which ruling this defendant then & there duly excepted, & which exception is hereby settled & allowed.

And thereupon the court did on its own motion charge the jury as follows:

133 GENTLEMEN OF THE JURY: The law of the United States upon which the indictment was drawn and on which the defendant is now upon his trial contains the following language:

"That if any person shall receive, conceal, or aid in concealing, or have or retain in his possession, with intent to convert to his own use or gain, any money, property, record, voucher or valuable thing whatever of the moneys, goods, chattels, records or property of the United States, which has theretofore been embezzled, stolen or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen or purloined, such person shall on conviction" be punished as provided in the law.

The object of the law, gentlemen of the jury, must be apparent to every one. It is in line and a part of the system of the laws which punish the larceny or theft of property from the United States, and is passed for the purpose of rendering it more difficult for people to commit larceny of Government property. It is for the purpose of taking away the desire or incentive to commit theft of Government property by punishing in the way marked out in the statute any person who shall receive or conceal or aid in concealing or have in his possession any of this Government property, knowing the same to have been stolen from the United States, thus making it difficult or unprofitable for any person to steal, embezzle, or purloin property of the United States.

The indictment which was returned by the grand jury and upon which the defendant is upon trial, drawn under this statute, charges in substance that on or about the 7th day of June, 1896, persons who are mentioned and called in the indictment Thomas J. Wallace, Ed. Baxter, and Frank King committed a robbery at
134 the post-office at Highmore, in this district and State.

It is further charged and set out in the indictment that the property that was taken from the post-office at Highmore was of a certain kind and value—and it is described in this indictment—which consisted of different denominations of postage stamps and other property, a full description of which is given in the indictment.

It is further alleged in this indictment that those parties who committed the robbery and stole the property at Highmore have already been convicted by the judgment and sentence of this court, and that the defendant, Joseph Kirby, with intent to convert the property to his own use and gain, received and had in his possession certain of this property which is alleged to have been stolen from the post-office at Highmore, and that at the time he received this property or had it in his possession he knew that it had been stolen in the manner set forth in the indictment.

Now, in order to make out the case of the prosecution and in order that you should be authorized to return a verdict of guilty in this case, you must find beyond a reasonable doubt from the evidence in the case certain propositions to be true.

In the first place, it must be found by you beyond a reasonable doubt that the proper described in the indictment, and which is also described in the indictment against these three men whom it is alleged have been convicted, was actually stolen from the post-office at Highmore, was the property of the United States and of a certain value.

Second. You must find beyond a reasonable doubt that the defendant, Joseph Kirby, received or had in his possession a portion of that property which had been stolen from the post-office
135 at Highmore.

Third. That he received or had it in his possession with intent to convert it to his own use and gain.

Now, upon the first proposition—as to whether the property described in the indictment was stolen as alleged in the indictment—the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons—that is, the parties whom it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, that record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the Government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in coming to a conclusion that the property described in the indictment was actually stolen, as alleged, from the post-office at Highmore. But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore post-office.

Upon the further proposition that the court has suggested, after you have found, by a careful consideration of all the evidence, beyond a reasonable doubt, that the property alleged in the indictment was stolen, then you will proceed to consider whether or not the defendant ever at any time, either on the date alleged in the indictment or any other date within three years previous to the finding of the indictment, had in his possession or received any of this property which was stolen from the post-office at Highmore.

136 Now, in order to find the defendant guilty of the offense charged in the indictment, you would have to find beyond a reasonable doubt from all the evidence that he either actually received a portion or all of the property which was stolen from the post-office at Highmore, and that he received that property from the thief or thieves who committed the theft at the Highmore post-office or some agent of these thieves.

The statute punishes, you will observe, both the receipt of stolen property, knowing it to have been stolen, with the intent described in the statute, and also the having in the possession of such property, knowing it to have been stolen, with the intent to convert it to the person's own use or gain. If you find beyond a reasonable doubt that any of the property which was stolen at the post-office at Highmore was actually received or had in the possession of the defendant, then you cannot convict unless you further find that the defendant had the property in his possession or received it from the thief or his agent, knowing at the time that it was stolen property.

Now, upon the question of whether the defendant knew that it was stolen property, you will, of course, consider all the evidence in

the case. You have the right to find that the person or the defendant knew that it was stolen property from any admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have the right to infer that he did know. Now, if a person received property under such circumstances that would satisfy a man of ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen.

137 Now, the next point in the case is in regard to the intent the defendant had in regard to the use or disposal of the property. The statute requires that this receipt of stolen property, knowing it to have been stolen, must also be with the intent to convert it to the use of the party in whose possession it is found. There are statutes which simply punish the knowingly receiving of stolen property. That was the common law. But this statute has added this further ingredient that it must be done with the intent to convert it to the party's own use and gain. It was probably put in for the reason that the statute goes further than the common law, making it punishable to conceal or aid in concealing with intent to convert it to his own use and gain.

Now, all these propositions that I have charged must be made out by the prosecution, of course, beyond a reasonable doubt, and in case you have a reasonable doubt of any of these ingredients, it would be your duty to acquit the defendant.

You are the exclusive judges of the facts in this case and of the credibility of witnesses; and in determining their credibility, of course, you will consider their demeanor and acts upon the stand, their interest in the case, if any, and all such other circumstances which arise in the case which may show to you either the want of credibility or credibility of any witness that has testified in the case.

So far as this intent, gentlemen of the jury, is concerned, that the statute requires to exist in order to render the defendant guilty, that he should have had in his possession or received it with the intent to convert it to his own use and gain, in considering that question, gentlemen of the jury, you will take all the evidence in the

138 case and find what the intent of the defendant was. Was it to restore it to the Government that he received the property? Was his possession of it a mistake? Was his possession honest? From all of these circumstances you will find what his intent was, and, of course, in order to convict him of the offense you would have to find that that intent existed.

This question of reasonable doubt, gentlemen of the jury, of course, you and each one of you know better when you have a reasonable doubt, perhaps, than anybody else can tell you, and sometimes it has been thought that jurors are more confused by receiving a definition from the court as to what reasonable doubt is than they are aided by such definition, but as counsel always in their arguments, and as they have in this case, put great stress

upon reasonable doubt, I think, perhaps, it is well for the court to intimate to the jury what its opinion is in regard to this question of reasonable doubt.

Of course, in any proposition outside of what is known as the exact sciences of mathematics, we cannot arrive at mathematical certainty, nor can we in the question of reasonable doubt, and I charge you, gentlemen of the jury, that a reasonable doubt would exist in the mind of a juror when the juror, after a careful consideration and comparison of all the evidence in the case, could not say that he had an abiding conviction to a moral certainty of the truth of the charge—a certainty upon which a juror would be willing to act in affairs and matters of the highest concern to himself.

I exercised, gentlemen of the jury, the discretion of the court in keeping you together during the trial of this case. It only had one purpose and that was this: to have this case tried and determined upon the evidence and the law which should be produced and interpreted in this court, and to render it as impossible as the
139 circumstances of the case would admit that any prejudice or influence which might exist generally should have any influence upon your verdict.

You will consider all the facts in this case carefully in their bearing so far as the innocence of the defendant is concerned, or their bearing so far as his guilt is concerned, and then, after you have found all the facts, apply the law, and return such a verdict as you think justice demands in this case.

& thereupon the jury retired; and thereafter, on Friday, June 11th, 1896, at five o'clock p. m., the jury having requested the reading of certain portions of the evidence & further instructions, as appears by the request entered on the minutes of this court, upon the consent of the United States district attorney and the defendant and his attorneys, the defendant then being present in person, the court permits the stenographer to read the testimony, direct and cross, of the witnesses Fosness and Van Buskirk as aforesaid herein set forth, and thereupon the court did further charge the jury as follows:

GENTLEMEN OF THE JURY: You have asked for further instructions upon the point as to what constitutes a felony as to holding or having in possession stolen property.

In addition to what I have already said in the regular charge upon this subject, I will state that the defendant in this action is now being tried upon the allegations of what is termed by the prosecution the first count in the indictment. The first count in this indictment charges in substance that Wallace, Baxter,
140 and King did, on the 7th day of June, 1896, break and enter into the United States post-office at Highmore with intent to commit larceny therein and did steal, take, and carry away from the post-office, of the property of the United States, certain postage stamps of certain denominations described in the indictment, which are one-cent stamps, two-cent stamps, four-cent stamps, five-cent stamps, eight-cent stamps, and certain other property consisting of money and other property described in this indictment.

It is further alleged that these three defendants have been convicted in this court of the crime of stealing that property from the post-office at Highmore.

It is further alleged that this defendant, Joseph Kirby, on the 9th day of June, 1896, received and had in his possession the postage stamps that had theretofore been stolen from the post-office at Highmore by these three parties I have mentioned, knowing at the time he received or had them in his possession that they had been stolen from the United States at the post-office at Highmore, with intent to convert the same to his own use and gain. That is the charge against the defendant.

The statute of the United States upon which this indictment is drawn reads as follows:

"That, if any person shall receive, conceal or aid in concealing, or have or retain in his possession, with intent to convert to his own use and gain, any money, property, record, voucher or valuable thing whatever of the United Ststes, which has theretofore been embezzled, stolen or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen or purloined, such person shall, on conviction, be punished."

141 The statute punishes the receiving under any of the circumstances mentioned in the section; it punishes the concealing; it punishes the aiding in concealing; it punishes the having in possession; it punishes the retaining in possession of any property stolen from the United States Government, the property of the United States, knowing the same to have been stolen, with intent to convert the same to the defendant's own use and gain.

This indictment does not contain all the words of the statute. This indictment charges the defendant with having, on the 9th day of June, 1896, received and had in his possession these postage stamps that were stolen from the United States at Highmore.

Now, if you should find beyond a reasonable doubt from all the testimony in the case, in the first place, that the postage stamps mentioned in the indictment or any of them were stolen from the post-office at Highmore by these parties whom it is alleged did steal them, and you further find beyond a reasonable doubt that these postage stamps or any portion of them were on the 9th day of June, 1896, received by the defendant from the thieves or their agent, knowing the same to have been so stolen from the United States by these parties, with the intent to convert the same to his own use and gain, or if you find beyond a reasonable doubt that they were so stolen at the Highmore post-office, as I have stated, and that the defendant, on or about the 9th day of June, had them in his possession or any portion of them, knowing the same to have been so stolen, with the intent to convert the same to his own use and gain, and you find all these facts beyond a reasonable doubt, you would be authorized to return a verdict of guilty as charged. Your

142 verdict in either event would be announced orally by your foreman, "We find the defendant not guilty," or "We find the defendant guilty as charged in the first count of the indictment."

As to finding the defendant guilty of part of the charges in the indictment without finding him guilty of all, I do not understand what that means, unless it refers, perhaps, to the property. Of course, in relation to that, it would not be necessary, in order to find a verdict of guilty, to find that the defendant received or had in his possession all the stamps stolen—that is, so far as the property is concerned.

Now, so far as being guilty of part of the charges is concerned, my other instructions have answered that.

So far as possession or a portion of the property, so far as I understand the question, I think I have answered that.

If there is nothing further, gentlemen, you may retire.

34th exception.

To which charge the said defendant then & there duly excepted as follows, & which exception is hereby settled & allowed:

Defendant excepts to that portion of the charge of the court in regard to the conviction of the three principal felons and the record in regard to it, and that nothing was said by the court as to the duty of the jury to return a verdict of not guilty unless they should find all these facts.

And thereafter, on Saturday, June 12th, 1897, at 5.20 p. m., jury returns into court, where the following proceedings were had:

By the COURT: Gentlemen of the jury, have you agreed upon a verdict?

By Mr. COLCORD, foreman: We have, your honor.

The COURT: What is your verdict?

143 Mr. COLCORD: We, the jury in the case of The United States against Joseph Kirby, defendant, find the defendant, Joseph Kirby, guilty of having in his possession stolen property belonging to the United States, as claimed in the indictment, knowing them to be such.

By the COURT: Gentlemen of the jury, in regard to the form of this verdict, of course, if the jury decides to find a special verdict, all the members of the jury would have to unite upon the findings of fact, and it would have to be technically correctly drawn up. Do I understand from the foreman that the jury finds the defendant guilty of having in his possession stolen property as charged in the first count of the indictment?

Mr. COLCORD, foreman: That is our decision, your honor.

The court directs verdict to be entered in the following form:

We, the jury in the case of The United States against Joseph Kirby, find the defendant, Joseph Kirby, guilty of having in his possession property of the United States, knowing it to have been stolen, as charged in the first count of the indictment.

Ask the jury, Mr. Clerk, if that is the verdict?

The defendant objects to the form of the verdict as given by the court, in asking the jury if that was their verdict, and insists upon the verdict as first rendered by the jury as being the verdict as returned by them.

By the COURT: What did you record, Mr. Clerk; any verdict?

Clerk reads the verdict as dictated to him by the foreman.

By the COURT: Gentlemen of the jury, the verdict that
144 you have returned does not state facts sufficient to formally express what you have expressed to the court that you find. You have either a right to find him guilty or not guilty as charged in the first count of the indictment; or, if you see fit, you may find the facts.

Foreman COLCORD: Your honor, we, the jury, find this case just as I have stated it, and I was instructed by the jurymen to give it in that way.

The court instructs the stenographer to read the verdict first given by the foreman, Mr. Colcord, which is done; after which it is dictated to the clerk, who enters it upon the record, reads it to the jury, who are asked if that is their verdict—11 replying in the affirmative and one replying in the negative.

By the COURT: If you cannot agree upon a verdict, gentlemen, I will have to ask you to return to your room & try and agree upon one.

Thereafter, at 7 o'clock p. m. of the same day, the jury return into the court-room. The following proceedings were had:

By the COURT: Gentlemen of the jury, have you agreed upon a verdict?

Foreman COLCORD: We have, your honor.

By the COURT: What is your verdict?

Foreman COLCORD: We, the jury in the case of The United States against Joseph Kirby, find the defendant, Joseph Kirby, guilty of the charges as contained in the first count of the indictment.

By the COURT: So say you all, gentlemen?

JURORS: Yes, sir.

145 UNITED STATES OF AMERICA, } ss:
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES }
vs. }
JOE KIRBY. }

And forasmuch as the facts aforesaid and the decision of the court thereon do not appear of record the defendant prays that this his bill of exceptions, consisting of from page 1 to page 128, including pages 16 A, B, C, and exhibits, as in the foregoing set forth, and containing the foregoing thirty-four exceptions, numbered, respectively, from one to thirty-four, as therein set forth, be, and the same are each hereby, severally settled, allowed, and sealed accordingly.

And it is further certified that said bill of exceptions, as aforesaid, contains all of the evidence introduced in this action, together

with the charge of the court in full and the instructions requested by said defendant and the rulings of the court thereon; and

It is further ordered that the foregoing be, together with all of the exceptions allowed in said proceedings, filed with the clerk of this court, and the same are hereby made a part of the record in this action.

Done at a day of the April, 1897, term of the district court, to wit, June 22nd, 1897.

JOHN E. CARLAND,
District Judge.

146 (Endorsed on back:) U. S. district court, district of South Dakota. The United States of America *vs.* Joe Kirby. Bill of exceptions. Filed June 22nd, 1897. Oliver S. Pendar, clerk.

And afterwards, to wit, on the 25th day of June, A. D. 1897, there was filed by the defendant herein his assignment of errors and his petition for a writ of error to remove this cause to the Supreme Court of the United States, and said defendant also presents to the presiding judge of this court a writ of error as prayed, and a citation citing and admonishing the said plaintiff to be and appear at said Supreme Court on or before sixty days from this date, which said writ of error is allowed and said citation signed by the judge; and said defendant also presents his bond in the penal sum of three thousand dollars, which is duly approved by the judge, who thereupon signs an order awarding supersedeas staying further proceedings upon the judgment and sentence herein.

147 Which said assignment of errors is in words and figures the following, to wit:

UNITED STATES OF AMERICA, }
District of South Dakota. }

In District Court Thereof, Southern Division.

UNITED STATES }
vs. }
JOE KIRBY. }

Now comes the defendant, Joe Kirby, in his own proper person and by his attorneys and counsel, F. R. Aikens, Esq., and D. R. Bailey, Esq., and in connection with his petition for a writ of error makes the following assignment of errors which the defendant avers occurred upon the trial of said cause, to wit:

UNITED STATES OF AMERICA, *District of South Dakota*, } ss:

In District Court Thereof, Southern Division.

UNITED STATES *vs.* JOE KIRBY. } Assignment of Errors.

I. The court erred in overruling the demurrer interposed by this defendant to that portion of said indictment designated by the defense as the first and second counts and by the prosecution as the first count, being that portion of said indictment which relates to the Highmore post-office, for the reason in said demurrer stated, and especially (*a*) that said postage stamps are not alleged to have the character of stolen property at the time this defendant is charged with receiving the same; (*b*) that the postage stamps are not alleged to have been the property of the United States at the time this defendant is charged with the receipt thereof, nor are the same alleged to have any value; (*c*) that said indictment does not state that this defendant received said stamps from the alleged thief; (*d*) that said portion of the indictment above referred to and on
148 which this defendant has been tried consists, if anything, of two separate and distinct counts, and are not so numbered or set forth so that a jury could intelligently pass on each separate count; (*e*) that this defendant is nowhere named or mentioned in the first count in said indictment, which, if anything, is a good count against Wallace, Whalen, and King; (*f*) that to sustain said indictment would be to in effect hold that the grand jury could in one instrument institute a general jail delivery, indicting as many parties as they might see fit in the one instrument for separate and distinct charges.

II. The court erred in overruling the defendant Joe Kirby's plea to former jeopardy and former acquittal to said indictment and the whole thereof, and especially for the following reasons: (*a*) That no issue by demurrer, answer, or otherwise was taken thereto by the prosecution, and therefore the plea stands as admitted; (*b*) that said plea shows that on the former trial, at the April, 1897, term of this court, of this defendant upon the same charges on which he has been now placed on trial the court did, in his absence and without his knowledge or consent, and without any good and sufficient cause therefor, and against the will and desire of this defendant, discharge said jury so impaneled, sworn, and charged with the delivery of this defendant in said action, and thereby by said wrongful discharge defendant was in effect acquit-ed; (*c*) that by reason of the things aforesaid and the wrongful discharge of said jury on the 23rd of April, 1897, this defendant had theretofore and prior to the last trial, which commenced on June 8th, 1897, and prior to the filing of said plea, been for the same alleged offense put in jeopardy of life and limb within the meaning of art. 5 of the amendments of the Constitution of the United States, as will more fully appear by said plea now on file with the clerk.

149 III. The court erred in overruling the defendant Joe Kirby's challenge to the array of the petit jury for the reasons set forth in said challenge and refusing to examine into the truth of the matters and things set forth in said challenge, and especially (*a*) that said challenge was not denied by the prosecution nor no issue by the prosecution formed hereon; (*b*) that it appears from said challenge that the city of Sioux Falls, in said district, wherein this defendant, Joe Kirby, has resided and practiced law continuously for the last ten years and upward, contains two thousand persons possessing the qualifications required by law for United States jurors, and that the jury commissioner and clerk of court willfully, wrongfully, and intentionally omitted from the jury-box and jury-list selected by them all persons from said city for the express purpose and with a view of procuring a jury adverse to this defendant; (*c*) that said jury to which said challenge was interposed was not a jury of the vicinage where the crime is alleged to have been committed and where the defendant resides; (*d*) that the court has no power to order, permit, or receive over the defendant's objection a jury drawn from a particular part of the district, unless such part includes the vicinage of the alleged crime and where the defendant resides, for a jury so drawn would not be such as is contemplated by the Constitution of the United States.

IV. The court erred in overruling the defendant Joe Kirby's objection to the introduction of any evidence under said indictment made at the opening of the trial, and especially (*a*) for the reasons given above on the demurrer to said indictment; (*b*) that section 2 of the act of Congress approved March 3rd, 1875, being an act entitled "An act to punish certain larcenies and receivers of stolen property," is unconstitutional and not according to due pro-
150 cess of law or the law of the land, and attempts to make the acts of third parties, performed in his absence and without his knowledge or consent, evidence against him, and thereby attempts to deprive him of his constitutional right to meet the witnesses face to face.

V. The court erred in overruling the defendant Joe Kirby's objection to the introduction in evidence of the record of the September, A. D. 1896, term of the district court of the district of South Dakota for the western division, showing the indictment, arraignment, plea, trial, conviction, and sentence of Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, which evidence was in substance as follows: The record of the court showing that the grand jury returned an indictment at said September, 1896, term against Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, charging them on the 7th day of June, *June*, with committing larceny in the post-office of the United States at Highmore, in said district, and stealing therefrom postage stamps of and money of the United States; to which charge at said term the said defendant, King, plead not guilty and was tried by jury, found guilty, and sentenced; and especially for the following reasons: (*a*) That the act of Congress approved March 3rd,

1875, and above referred to and under which it was sought and the court allowed said evidence to be introduced, is unconstitutional and not according to due process of law or the law of the land, for the defendant has a right to meet the witnesses face to face, and under such record evidence of the action of the grand jury or of such third parties in another case this defendant, Joe Kirby, is deprived of such right; (*c*) that to permit such evidence to be introduced or hold such act constitutional is to make this defendant's property and liberty dependent upon the acts of third parties with whom he had no connection, and would be to allow said
151 third parties to create and make substantial evidence of the *corpus delicti* of the crime of which he is charged.

VI. The court erred in admitting in evidence the record of the American Express Company kept at Sioux Falls, S. D., as follows: "One package from Gettysburg addressed to Joe Kirby, Sioux Falls; weight, 2½ lbs.; charges, 30 cts., prepaid. Receipt of consignee, Joe Kirby;" for and especially (*a*) as said entry in the books of the American Express Company was a private record, hearsay in its nature as to this defendant; that the person who made the same was not called as a witness and no witness testified as to the truth of the facts stated in such entry; that no foundation was laid there, *for* as no such package was shown to have been received at Sioux Falls or ever shipped from Gettysburg, as will more fully appear by the bill of exceptions.

VII. The court erred in overruling this defendant Joe Kirby's motion to strike out the testimony of William Nicoli, which testimony is in substance as follows: That he believed that on the 9th day of June, 1896, he delivered the package described in the above indictment at Mr. Kirby's office, in Sioux Falls, but that he had no personal knowledge thereof; that the reason for his belief was that his check-mark appears opposite said entry; that said check-mark was made by him when he took said package out of the express office for the purpose of delivering the same, and that sometimes he took such packages back without delivering them, and might have done so with this; as this evidence is (*a*) a mere supposition on the part of the witness and not any statement of facts upon which perjury could — predicated; (*b*) that such evidence does not tend to establish the fact that any such package was ever received in Sioux Falls to deliver to this defendant; (*c*) that there was no foundation laid for the introduction of such evidence, in that the package received by Mr. Howe, the express agent at Gettysburg, was ever sent from Gettysburg and is not shown to have been received at
152 Sioux Falls, as will more fully appear by the bill of exceptions now on file in this action.

7½. The court erred in allowing Mr. Van Buskirk to testify over defendant's objection after he stated he could not remember all the testimony and without further qualification, to wit: That Kirby stated to Miller in response to the latter's inquiry that the package he had contained what Fosness wants, as will more fully appear by the bill of exceptions, & holding that without further qualification that he might testify to what he, Van Buskirk, knew.

VIII. In overruling the defendant Joe Kirby's motion at the close of the trial, requesting the court to hold and rule as a matter of law (*a*) that the evidence introduced on the part of the prosecution was not sufficient to justify the jury in returning a verdict other than not guilty; (*b*) to instruct the jury to return a verdict of not guilty for the reason given in said motion, and especially (*c*) that there is no evidence whatever that the United States was the owner of any of the postage stamps alleged to have been received by the defendant at the time he was charged with receiving the same or otherwise; (*d*) that there is no evidence that the alleged postage stamps had any value; (*e*) that there is no competent evidence introduced that the postage stamps were stolen by any of the parties named in the indictment or otherwise from the post-office at Highmore; (*f*) that there is no evidence that the defendant ever received from the alleged thief or otherwise any postage stamps alleged to have been stolen from Highmore; (*g*) that there is no evidence that the defendant ever knew that any of the postage stamps had been stolen from Highmore or otherwise; (*h*) that there is no evidence that the defendant ever intended to convert any of said alleged postage stamps to his own use or gain; (*i*) that there is no evidence of the
153 identity of the postage stamps delivered by the defendant to Mr. Fosness with the stamps alleged to have been stolen from the Highmore post-office; (*j*) that there is no evidence that there is or ever was any post-office at Highmore; (*k*) that the testimony of Mr. Fosness, which is the only evidence by which the prosecution have sought to connect the stamps received by him from the defendant with the stamps alleged to have been stolen from Highmore post-office, simply states that he asked Mr. Kirby who shipped him a package from Gettysburg, which he supposed had been sent, and what it contained, and later, in response to Mr. Miller's question as to what said package did contain, Kirby states, "It contains that he, Fosness, wants, to wit, stamps," it nowhere being stated by any of said parties that said package contained, nor that any of said parties understood it contained, stamps alleged to have been taken from Highmore.

IX. The court erred in overruling the said defendant Joe Kirby's motion to strike out the testimony of witness Howe, which in substance states that a party, E. Baxter, who was a different person from any of the persons mentioned in the indictment, delivered him a package to be sent to the said defendant, Joe Kirby; that he had an assistant in his office who was not called as a witness, and that he had no knowledge whether said package had been sent, which testimony should have been stricken out for the following reasons: (*a*) The same *are* wholly irrelevant to the issues of the case & prejudicial to this defendant on account of the similarity of the name of E. Baxter with that of Ed. Baxter mentioned in the indictment; (*b*) that the evidence both of Mr. Howe and Mr. French conclusively show that said E. Baxter was a different party from Ed. Baxter mentioned in the indictment and alleged to have been convicted at Deadwood.

X. The court erred in overruling the defendant Joe Kirby's
154 motion to strike out the evidence of L. S. Tyler, which in substance is as follows: That a record was kept in his Amer-

ican Express office; that he had a record of said office, and that said record was made by one of the clerks, he thought, and that he had no knowledge of the alleged receipt by the defendant of the express package from Gettysburg for the reason (*a*) that such evidence is prejudicial to the defendant, incompetent, irrelevant, and hearsay.

XI. The court erred in overruling the said defendant Joe Kirby's motion, made at the close of the trial, requesting the court to instruct the jury to acquit the defendant for the following reasons: (*a*) That the indictment does not state facts sufficient to constitute a public offense against the Government of the United States; (*b*) that there is not sufficient evidence in the case to warrant the jury in returning a verdict of other than not guilty, as will more fully appear by the bill of exceptions, which is settled, allowed, and made a part of the record in this action.

XII. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"You are instructed that in this case the defendant before proceeding to trial has entered a plea of former jeopardy, claiming that he has been placed on trial, and in legal effect acquitted, of this alleged crime of which he is now charged. Upon this plea the prosecution has not seen fit to take issue; therefore for the purpose of this proceedings the truth of such plea, which the defendant has offered to verify, must be accepted. This being the condition of the case as now before the court, you are instructed to return a verdict finding all the issues upon such plea in favor of said defendant; in other words, you must find that the defendant has heretofore
155 been placed in jeopardy of liberty and property upon this same charge. Having found as above, such verdict will, of course, be a bar to the present proceedings, and you are instructed, *to* in the present proceedings on the plea of not guilty, to return a verdict of not guilty."

XIII. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"The defendant in this case is charged with feloniously receiving, and having in his possession, with intent to then and there *to* convert to his own use and gain certain postage stamps alleged to be the property of the United States, he, the said defendant, then and there well knowing that said postage stamps had heretofore been feloniously stolen, taken, and carried away. In order to sustain this charge it is not sufficient on the part of the Government to show that said postage stamps must have been stolen, if you believe they were stolen, and that the same came into the possession of defendant, but the defendant must *be* at the time he received such stolen property, if he did so receive it, have known that the same was stolen property, as charged in the indictment, and as the evidence in this case fails to show any such knowledge on the part of the defendant, you are instructed by the court to return a verdict of not guilty."

XIV. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"Recent unexplained possession by the defendant of stolen prop

erty may be evidence from which the jury would be justified in finding the defendant had committed the crime of larceny, but in order to justify a verdict other than not guilty upon the charge in the indictment upon which this defendant is now on trial, it is necessary for the prosecution to show that the defendant had knowledge that said property had been stolen. The burden is on the prosecution to show such knowledge, and not on the defend-
156 ant to show the want of it."

XV. The court erred in refusing to charge the jury and give them the following instruction requested by the defendant:

"In order to establish the crime charged in the indictment upon which this defendant is now on trial it is necessary for the prosecution not only to satisfy you beyond a reasonable doubt that the property with which this defendant is charged with receiving was then stolen property, but it is likewise necessary for it to prove that the defendant had knowledge at the time he received it that such property was so stolen, and the prosecution must likewise satisfy you that the defendant received such property so stolen and with such guilty knowledge from the thief; and as the testimony of Mr. Howe, the express agent at Gettysburg, the one who claims one E. Baxter sent the package which the Government claims contained the stolen property, and as no attempt has been made by the prosecution to connect the said E. Baxter in any manner with the alleged theft nor to identify him as being Ed. Baxter, the record of whose conviction is set forth, and as the testimony of Mr. French likewise tends to show that a party named Baxter, other than the Baxter the records of whose conviction is before you, was at Gettysburg at the same time, and as the testimony of Mr. Fosness as to Mr. Kirby's statement in response to his or Mr. Miller's inquiry as to what the package contained merely states that it contained property that Mr. Fosness was seeking, and such statement, while it might tend to show Mr. Kirby's opinion then that he had the stamps stolen from Highmore, still it could not be taken as an admission that he had received such property from the thief, nor that he had at the time he received it any guilty knowledge of the theft of such property, and therefore you are instructed to return a verdict of not guilty."

XVI. The court erred in neglecting and refusing to instruct the jury that if they failed to find that the defendant intended
157 to convert the alleged stolen property to his own use or gain that they should acquit the defendant.

XVII. The court erred in sending the jury out to deliberate further upon the case to attempt to find another or different verdict than the following one which was entered on the record of the court: "We, the jury in the case of the United States *vs.* Joseph Kirby, defendant, find the defendant, Joseph Kirby, guilty of having in his possession stolen property belonging to the United States, as claimed in the indictment, knowing *them* to be such."

XVIII. The court erred in allowing one member of said jury to dissent from said verdict after the same had been entered upon the record of the court.

XIX. The court erred in making the following remarks to the jury when they returned the aforesaid special verdict, to wit: "The verdict that you have returned does not state facts sufficient to formally express what you have expressed to the court that you find. You have either a right to find him guilty or not guilty as charged in the first count of the indictment."

XX. The court erred in denying the defendant's motion for a new trial and in refusing to vacate and set aside the verdict therein for the following reasons: (*a*) The reasons given, as aforesaid, in these assignments to the introduction of any evidence at the opening of the case; (*b*) the reasons given, as aforesaid, in these assignments upon the defendant's request to direct a verdict in his favor at the close of the case; (*c*) that said verdict is not returned against this defendant, Joe Kirby, but against some other party under the name of Joseph Kirby; (*d*) that the affidavits of the jurors which have been presented upon the motion for new trial show conclusively that at the time when they returned the special verdict they were misled by the remarks of the court that they could find the defendant
158 guilty as charged in the first count, and that the general verdict as announced by the foreman and entered upon the minutes of the court was not the verdict of the jury as agreed upon in the jury-room and did not express to the court the facts found by the jury; (*e*) that said affidavits of the jurors further show conclusively that said jury did not find that the said defendant intended to convert said stamps or any part thereof to his own use or gain, but that in effect the jury found he did not intend so to do; (*f*) that the affidavits used upon the motion for new trial further show that Christian Schnaid, one of the jurors who was sworn and charged in this action, and who united in finding said verdict, was incompetent to sit, biased and prejudiced against said defendant, Joe Kirby, before and at the time he was so sworn and charged, which fact was not known to the said defendant or his attorneys until after he was so sworn and charged, which condition of mind and upon which ground of incompetency and ground of challenge the said juror did when examined upon his *voir dire* deny, and thereby a fraud was committed upon the said defendant and upon this court by said juror and by the prosecution.

XXI. The court erred in overruling the said defendant Joe Kirby's motion in arrest of judgment, and especially for the following reasons: (*a*) That the facts stated in the indictment are not sufficient to constitute a cause of action against this defendant or to show that he committed any offense against the laws of the United States; (*b*) that the special verdict found by the said jury entered on the minutes of the court was never vacated and set aside, and that said special verdict would not sustain any sentence against the defendant, but would entitle him to his discharge; (*c*) that said special verdict having been entered on the minutes of the court, the court had no jurisdiction to allow said jury to again re-
159 tire and deliberate upon the case; (*d*) that said verdict is against and finds one Joseph Kirby guilty and does not pass upon this defendant, Joe Kirby, in any manner; (*e*) that the plea of

former acquit-al and former jeopardy interposed by this defendant upon said trial *were* not by the prosecution denied and no issue taken thereon, and that thereby the truth of said plea was admitted; (*f*) that said plea of former acquit al and former jeopardy constitute a complete bar to the trial of the present case; (*g*) that the affidavits of the jurors conclusively show that the general verdict as announced by the foreman and entered on the minutes of this court does not express the findings of fact as agreed upon by the jury in the jury-room, but that the same was so announced and received under a mistake of law.

XXII. The court erred in refusing to consider the affidavits of Jurors Colcord, Dwyer, Rice, Ferguson, & Hinds showing they did not agree upon such a verdict as was entered in court, & that such verdict so entered was not the verdict of the jury, & therefore void in not.

XXIII. The court erred in overruling the defendant Joe Kirby's objection made to Mr. Fosness' testimony, and especially in overruling the objection to the question, "What, if anything, was said relevant to other packages received by him from these men?" which upon being overruled by the court, Mr. Fosness testified as follows: "In the evening after he delivered said package to me, I said, While I am here I may as well ask you about the two other packages that you have received from these men from Aberdeen just after the post-office robberies at Miller and Waubay. He seemed considerably surprised at the question, and said, Give me the dates, please, of these packages. I gave him the dates, and he made a note of it on a piece of paper. I asked him what was in the packages. He said he did not know. I said, They sent them to you. He said he did not open them."

JOE KIRBY, *Defendant.*

160 D. R. BAILEY,
FRANK R. AIKENS,
Att'ys & of Counsel.

Now comes the said defendant, and for the reasons appearing above, as well as in the records and proceedings had herein, *and* respectfully asks the honorable the supreme court that the action of the trial court be reversed, and that he have such relief as may be proper & just.

JOE KIRBY, *Defendant.*

D. R. BAILEY,
FRANK R. AIKENS,
Att'ys & of Counsel.

(Endorsed:) The United States of America *vs.* Joe Kirby. Assignment of errors. Filed June 25th, 1897. O. S. Pendar, clerk.

161 Said petition for writ of error is in words and figures the following, to wit:

UNITED STATES OF AMERICA, } ss:
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES }
vs. } Petition for Writ of Error.
JOE KIRBY. }

To the honorable judge of the district court in and for the district of South Dakota:

Now comes the defendant in the above-entitled action, Joe Kirby, in his own proper person and by his attorneys and counsel, F. R. Aikens, Esq., and D. R. Bailey, Esq, and complains that in the records and proceedings and also in the rendition of judgment in this action prosecuted on behalf of the United States of America against the said Joe Kirby, as defendant, in the district court in and for the district of South Dakota, in which action this defendant, the said Joe Kirby, was convicted of an infamous crime, and in said case there is likewise involved the construction and application of the Constitution of the United States, as likewise *are* the constitutionality of the laws of the United States drawn in question, in which action judgment was on the 25 day of June, 1897, rendered against the said defendant, Joe Kirby, and sentence upon said day thereupon pronounced against him, all of which was entered on the records and minutes of this court, *and* manifest error hath intervened, to the great damage of said defendant, Joe Kirby, as will appear in detail from the assignment of errors filed in said cause.

Wherefore now, at said term of court at which said sentence was pronounced, comes this defendant, Joe Kirby, and prays that the writ of error may issue in his behalf from this district court to the Supreme Court of the United States for the correction of the
162 errors so complained of, and that there be annexed to and returned with such writ of error an authenticated transcript of the records, an assignment of errors, prayer of reversal, with all papers and proceedings had in this case, to said Supreme Court.

JOE KIRBY, *Defendant.*

—— ——,
Attorneys & of Counsel.

And now, to wit, on this 25th day of June, 1897, it is ordered that said writ of error be allowed as prayed for.

JOHN E. CARLAND,
District Judge.

(Endorsed:) The United States of America *vs.* Joe Kirby. Petition for writ of error. Filed June 25th, 1897. O. S. Pendar, clerk.

163 Said appearance bond to U. S. Supreme Court is in words and figures the following, to wit:

Know all men by these presents that we, Joe Kirby, as principal, and J. B. Clark & W. C. Hollister, as sureties, are held and firmly

bound unto the United States of America in the full and just sum of three thousand dollars, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with out seals and dated this 25th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at the April term, A. D. 1897, of the district court of the United States for the district of South Dakota, in a suit depending in said court between The United States of America, plaintiff, and Joe Kirby, defendant, a judgment and sentence was rendered against the said Joe Kirby, and the said Joe Kirby has obtained a writ of error from the Supreme Court of the United States to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Supreme Court, at the city of Washington, sixty days from and after the date of said citation; which citation has been duly served:

Now, the condition of the above obligation is such that if the said Joe Kirby shall appear in the said Supreme Court on the first day of the next term thereof, to be held at the city of Washington on the first Monday in October, A. D. 1897, and from day to day thereafter during said term, and from term to term and from time to time until finally discharged therefrom, and shall abide
164 by and obey all orders made by the said Supreme Court in said cause, and shall surrender himself in execution of the judgment and sentence appealed from, as said court may direct, if the judgment and sentence of the said district court against him shall be affirmed by the said Supreme Court, then the above obligation to be void; else to remain in full force, virtue, and effect.

JOE KIRBY. [SEAL.]
J. B. CLARK. [SEAL.]
W. C. HOLLISTER. [SEAL.]

Witnesses:
D. R. BAILEY.
F. H. HOLLISTER.

Approved:
JOHN E. CARLAND,
Judge of the District Court, District of South Dakota.

STATE OF SO. DAKOTA, } ss:
Minnehaha Co., }

Be it known that on this 25th day of June, 1897, before me, Katie Rochford, a notary public in & for said county, personally appeared Joe Kirby, J. B. Clark, & W. C. Hollister, well known by me to be the parties described in and who executed the foregoing, and acknowledged to me they executed same.

[NOTARIAL SEAL.] KATIE ROCHFORD,
Notary Public, S. D.

(Endorsed:) No. 557. The United States of America *vs.* Joe Kirby. Appearance bond to U. S. Supreme Court. Filed Jun- 25, 1897. Oliver S. Pendar, clerk.

165 Said order allowing writ of error and awarding supersedeas is in words and figures the following, to wit:

UNITED STATES OF AMERICA, } ss:
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES } Order Allowing Writ of Error with Supersedeas.
vs.
JOE KIRBY. }

Came the defendant, Joe Kirby, herein, and in his own proper person and by his attorneys files herein and presents to the court his petition praying for the allowance of a writ of error to the Supreme Court of the United States, praying also that a transcript of the records, assignment of errors, prayer of reversal, and papers and proceedings upon which such judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and further proceedings may be had therein as may be proper in the premises.

Now, therefore, I, the undersigned judge of said district court, acting within said district, do allow said writ of errors, which said writ shall operate as supersedeas to the judgment and sentence of this court in said action pending such writ of error.

JOHN E. CARLAND,
District Judge.

(Endorsed:) The United States of America *vs.* Joe Kirby. Order allowing writ of error and awarding supersedeas. Filed June 25th, 1897. O. S. Pendar, clerk.

166 UNITED STATES OF AMERICA, } ss:
Eighth Judicial Circuit, District of South Dakota, }

In District Court.

I, Oliver S. Pendar, clerk of the district court of the United States in and for the district of South Dakota, do hereby certify and return to the honorable the United States Supreme Court that the foregoing, consisting of 165 pages, numbered consecutively from 1 to 165, inclusive, is a true and complete transcript of the record (including the indictment, arraignment, plea, demurrer, and all orders of the court, together with the trial proceedings, verdict, judgment, and sentence of the court), bill of exceptions, assignment of errors, and all proceedings in this case, No. 557, of The United States of America *vs.* Joe Kirby, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript

and included within said paging the original citation, together with the proof of service thereof.

Seal U. S. Dist. Court, Dist. of South Dakota, Sioux Falls.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Sioux Falls, in the district of South Dakota, this 10th day of August, A. D. 1897.

OLIVER S. PENDAR,
Clerk of said Court.

[Endorsed:] United States district court, district of South Dakota. The United States of America *vs.* Joe Kirby. Return to United States Supreme Court.

Endorsed on cover: Case No. 16,666. South Dakota D. C. U. S. Term No., 164. Joe Kirby, plaintiff in error, *vs.* The United States. Filed September 11th, 1897.

WRIT OF CERTIORARI AND RETURN.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 194.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

FILED DECEMBER 10, 1906.

(16,806.)

(16,666.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 4, 1899.

1 To the Supreme Court of the United States:

In obedience to the annexed writ of certiorari, I hereby make return as in said writ commanded.

I.

In relation to specification No. 1, contained in said writ, I find, after examination, that the record as certified to your honorable court, pursuant to the writ of error issued in the action of Joe Kirby, plaintiff in error, *vs.* The United States, defendant in error, is in all respects the same as now appears upon the original records of the district court of the United States for the district of South Dakota in the suit of The United States, plaintiff, and Joe Kirby, defendant.

II.

In relation to specification No. 2, contained in said writ, I hereby return Exhibit "A," consisting of affidavits of jurors, pages "1" to "21," inclusive, the same being the affidavits referred to in paragraph "VII" of defendant's motion in arrest of judgment. I further certify and return that these same affidavits were used and by the court considered in support of a motion for a new trial, as will fully appear by assignment of error No. "XX," subdivisions "D"
2 and "E," page 106 of the printed record; and that said affidavits were not considered on the motion in arrest of judgment for the reason that in the opinion of the trial judge said affidavits did not contain matters proper to be urged on a motion to arrest the judgment which attacks the record only.

III.

In relation to specification No. 3, I hereby return Exhibit "B," consisting of journal entries, pages "1" to "10," inclusive, which I certify are true copies of the original record in the first trial of the suit of The United States, plaintiff, *vs.* Joe Kirby, defendant, in the district court of the United States for the district of South Dakota, upon the same indictment on which said Kirby was convicted, as the same now appears upon the records of said court.

Respectfully submitted.

JOHN E. CARLAND,
United States District Judge, District of South Dakota.

Dated Dec. 7th, 1898.

3 THE UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the judge of the district court of the United States for the district of South Dakota, Greeting:

Whereas in a certain suit in said district court between The United States, plaintiff, and Joe Kirby, defendant, which suit was removed to the Supreme Court of the United States by virtue of a

writ of error, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"And now comes the plaintiff in error and suggests to the court here that the record as certified to this court does not correctly state all the matters and things purported to be certified, and omits to state certain material matters which are essential to the proper consideration of the questions presented by the writ of error to this court for review upon the exceptions taken by the plaintiff in error at the time of his trial in the district court for the district of South Dakota. And thereupon the plaintiff in error shows:

I. That the statement upon the 9th page of the printed record that 'the jury being sworn in said cause, counsel for the defendant files a motion to discharge the defendant for the reason that the defendant has already been placed in jeopardy for the offence for which he is now to be tried,' is not a correct statement in this, that the said motion to discharge the plaintiff in error, to be found on pages sixteen and seventeen of the record, was in fact filed, heard and overruled by the court before the jury was sworn, as appears from the annexed affidavits.

II. Also in that it appears upon page eighteen of the record that the plaintiff in error filed a motion in arrest of judgment, and in support of the 7th clause thereof, and submitted certain affidavits of the jurors who rendered the verdict. That upon presenting said motion in arrest of judgment, the court, upon motion of the
4 United States district attorney, struck out said 7th clause and refused to consider the same, to which ruling the plaintiff in error duly excepted, as appears by page twelve of the record, and that this court cannot pass upon the matter of said exception as presented by assignment of errors XXI and XXII, page 107 of the printed —, without said affidavits being certified in the record. The said record does not certify said affidavits to this court, although they are still existing among the files of the case in said district court and in the custody and control of the clerk thereof, copies of which affidavits are hereunto attached as a part of this motion.

III. In that it appears all the matters and things mentioned in the said plea of former jeopardy, as set forth on pages sixteen and seventeen of the printed record, appear of record in this case in the trial court, and that the record of the trial court in this action shows that on the twenty-third of April, 1897, upon the former trial of this action, upon the plea of not guilty to the same indictment as is and was used upon the trial of the present action, which former trial resulted in a disagreement of the jury charged with said trial, said jury were brought into court, discharged from the further consideration of said case, which said discharge of the jury at that time plaintiff in error claims was ordered by the court during his absence and the absence of his counsel, and without his consent and against his wish and desire, and that the discharge of the jury the plaintiff in error insists was improper for that reason and otherwise, and hath ever claimed that he was thereby placed in jeopardy by the fact of that trial and was entitled to a discharge from further liability

on account of said indictment, and said discharge of the jury being without his knowledge of consent and without good or sufficient cause therefor, all of which at large and more fully appears from the records of said court s ill existing, and the plaintiff in error is advised that the case cannot properly be considered in this court unless this court shall have before it the record of said former trial, none of which has been certified in the record to this court."

You therefore are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of November, A. D. 1898.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

5 EXHIBIT "A."

Affidavits of Jurors, Pages "1" *to* "21," *Inclusive.*

UNITED STATES OF AMERICA, }
District of South Dakota. }

District Court Thereof, Southern Division.

UNITED STATES, Plaintiff, }
vs. }
JOE KIRBY, Defendant. }

STATE OF SOUTH DAKOTA, }
County of ——, } *ss:*

I, the undersigned, being first duly sworn, do on oath depose and say that I am one of the jurors duly empaneled and sworn and charged in the above-entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word count used by the defendant in his objection to the evidence, and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there *was* four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had
6 been read to us; that each of said counts, as I understood the court to charge us, was as follows:

First. Were the stamps mentioned in the indictment stolen from the post-office at Highmore?

Second. Were the parties who stole the stamps from the post-office at Highmore convicted at Deadwood?

Third. Did the defendant receive those stamps knowing them to have been stolen?

Fourth. Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above-named constituted a count in said indictment; that, upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment was a major portion of the time six each way, and that part of the time seven of said jury voted "not guilty;" that said jury and the different members thereof in said voting, as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain; that finally, about five o'clock on June 12th, 1897, the jury, being unable to agree upon a general verdict, prepared a special verdict, to which, in the jury-room, they all agreed, which special verdict was reported into court and entered on the minutes of the court under direction of
7 the jury, but thereafter, and before the jury were discharged from the case, one of the jurors, Mr. Glass, dissented; that at the time said special verdict was reported, as aforesaid, the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that, as said special finding did not in any manner find the defendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning that we could arrive at the same result as our special finding indicated by finding the defendant guilty as charged in the first count; that on returning to the jury-room your affiant believed and has reason to believe, from the remarks and conversations had with his fellow-jurors, that several, if not all, of his fellow-jurors believed that the charge against the defendant of intending to convert said alleged stolen property or any part thereof to his own use or gain was not included in the first count of said indictment, and that it was the intent of this affiant and, as he believes, of all his fellow-jurors that by returning a verdict of guilty as charged in the first count they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen, or any part thereof, to his own use
8 or gain; that upon returning to the jury-room the last time after having rendered such special verdict, as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted or, as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict, and no more, and thereupon, upon coming into court the last time, when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said ver-

dict did not and should not exceed in its findings that found in the special verdict, and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain; that if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury-room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own
9 use or gain. Your affiant says that in his opinion there was no evidence whatever that would justify him, under his oath as a juror, either directly or indirectly, of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

E. FERGUSON.

Subscribed in my presence and sworn to before me by E. Ferguson this 18th day of June, A. D. 1897.

S. D. BROWN, [SEAL.]
Notary Public, South Dakota.

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

10 UNITED STATES OF AMERICA, }
District of South Dakota. }

District Court Thereof, Southern Division.

UNITED STATES, Plaintiff, }
vs.
JOE KIRBY, Defendant. }

STATE OF SOUTH DAKOTA, }
County of Clay, } *ss:*

I, the undersigned, being first duly sworn, do on oath depose and say that I am one of the jurors duly empaneled and sworn and charged in the above-entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence, and also heard the word count used by the court, and that the court instructed us, as I understood it, that there *was* four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts, as I understood the
11 court to charge us, was as follows:

First. Were the stamps mentioned in the indictment stolen from the post-office at Highmore?

Second. Were the parties who stole the stamps from the post-office at Highmore convicted at Deadwood?

Third. Did the defendant receive those stamps knowing them to have been stolen?

Fourth. Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that, upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment was a major portion of the time six each way, and that part of the time seven of said jury voted "not guilty;" that said jury and the different members thereof in said voting, as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain; that finally, about five o'clock on June 12th, 1897, the jury, being unable to agree upon a general verdict, prepared a special verdict, to which in the jury-room they all agreed, which special verdict was reported into court and entered on the minutes of the court under direction of the jury, but there-
12 after, and before the jury were discharged from the case, one of the jurors, Mr. Glass, dissented; that at the time said special verdict was reported, as aforesaid, the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that, as said special finding did not in any manner find the defendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning that we could arrive at the same result as our special finding indicated by finding the defendant guilty as charged in the first count; that on returning to the jury-room your affiant believed, and has reason to believe, from the remarks and conversations had with his fellow-jurors, that several, if not all, of his fellow-jurors believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use or gain was not included in the first count of said indictment, and that it was the intent of this affiant and, as he believes, of all his fellow-jurors that by returning a verdict of guilty as charged in the first count they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen, or any part thereof, to his own use or gain; that upon returning to the jury-room the last time after having rendered such special verdict, as aforesaid, Mr. Glass insisted
13 that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted or, as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict, and no more, and thereupon, upon coming into court the last time, when the verdict of guilty was announced, the

foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings as found in the special verdict, and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty we in effect found that defendant intended to convert said property to his own use or gain; that if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury-room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain. Your affiant says that in his opinion there was no evi-
14 dence whatever that would justify him, under his oath as a juror, either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

J. H. DWYER.

Subscribed in my presence and sworn to before me by J. H. Dwyer this 18th day of June, A. D. 1897.

C. A. CHRISTOPHERSON,
[SEAL.] *Notary Public, South Dakota.*

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

15 UNITED STATES OF AMERICA, }
District of South Dakota. }

District Court Thereof, Southern Division.

UNITED STATES, Plaintiff, }
vs.
JOE KIRBY, Defendant. }

STATE OF SOUTH DAKOTA, }
County of Moody, } *ss:*

I, the undersigned, being first duly sworn, do on oath depose and say that I am one of the jurors duly empaneled and sworn and charged in the above-entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence, and also heard the word count used by the court, and that the court instructed us, as I understood it, that there *was* four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that
16 had been read to us; that each of said counts, as I understood the court to charge us, was as follows:

First. Were the stamps mentioned in the indictment stolen from the post-office at Highmore?

Second. Were the parties who stole the stamps from the post-office at Highmore convicted at Deadwood?

Third. Did the defendant receive those stamps knowing them to have been stolen?

Fourth. Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that, upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment was a major portion of the time six each way, and that part of the time seven of said jury voted "not guilty;" that said jury and the different members thereof in said voting, as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain; that finally, about five o'clock on June 12th, 1897, the jury, being unable to agree upon a general verdict, prepared a special verdict, to which in the jury-room they all agreed, which special verdict was reported into court and entered on the minutes of the court under
17 direction of the jury, but thereafter, and before the jury were discharged from the case, one of the jurors, Mr. Glass, dissented; that at the time said special verdict was reported, as aforesaid, the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that, as said special finding did not in any manner find the defendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning that we could arrive at the same result as our special finding indicated by finding the defendant guilty as charged in the first count; that on returning to the jury-room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow-jurors, that several, if not all, of his fellow-jurors believed that the charge against the defendant of intending to convert said alleged stolen property or any part thereof to his own use or gain was not included in the first count of said indictment, and that it was the intent of this affiant and, as he believes, of all his fellow-jurors, that by returning a verdict of guilty as charged in the first count they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen, or any part thereof, to his own use or gain; that upon returning to the jury-room the last time
18 after having rendered such special verdict, as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted or, as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict, and no more, and thereupon,

upon coming into court the last time, when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict, and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain; that if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury-room; that said jury never agreed that the said defendant intended to convert said stamps or any
19 part thereof to his own use or gain. Your affiant says that in his opinion there was no evidence whatever that would justify him, under his oath as a juror, either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

JOHN RICE.

Subscribed in my presence and sworn to before me by *18th* this 18th day of June, A. D. 1897.

F. L. ROWLAND,
[SEAL.] *Notary Public, South Dakota.*

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

20 UNITED STATES OF AMERICA,
District of South Dakota, Southern Division.

UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant.

G. S. Hinds, being duly sworn, on oath deposes and says that he was one of the jurors duly empanelled, sworn, and charged in the above-entitled action on the 8th day of June, 1897.

That on the 12th day of June, 1897, said jury, after deliberation, appeared in court, and being interrogated by the court or by the clerk thereof as to whether they had agreed upon a verdict, and being answered in the affirmative by the foreman thereof, the jury, then being required to do so through their foreman, declared the verdict.

That the verdict, as affiant now remembers, was and is in the following form:

"We, the jury, find the defendant guilty as charged in the first count of the indictment."

That said verdict, upon being declared, was received by the court and entered upon the minutes thereof.

21 That, as this affiant is now advised, said verdict contains and embraces, among other things, the following finding of fact, to wit:

"That the defendant received the alleged stolen property in said indictment with the intent to convert the same to his own use," or that in substance.

That if such be the fact, that said verdict does embrace and make the foregoing finding of fact, the same is not and was not the verdict which this affiant agreed upon in the jury-room, and was not and is not the verdict of the jury.

That the verdict which the jury agreed to and which they sought to return to the court was and is in substance that the defendant had in his possession the alleged stolen property knowing the same to be stolen, and that the jury, through their foreman, sought to express in the foregoing form of the verdict given on the first page of this affidavit the verdict as just above stated, and it was sought by the jury to express in the verdict as finally declared and received by the court their agreement and verdict in substance that the defendant was guilty of having in his possession the alleged stolen property with the knowledge that the same was stolen.

Affiant further states that the jury had no means of knowing what the first count of the indictment charged, except the knowl-
22 edge they derived from hearing the indictment read at the commencement of the trial and from instructions of the court subsequently delivered; that no copy of said indictment was furnished to the jury nor used in the jury-room during their deliberations.

That if the verdict as declared and received is construed to contain the finding of the intent to appropriate such stolen property to his own use by the defendant, the same is a misunderstanding by the court as to the meaning the jury sought to convey by the verdict as declared, and that if such verdict as declared and received bears such construction, the same was and is an erroneous declaration of the actual verdict rendered, and that the entry is not and was not the verdict of the jury.

That the verdict of the jury is and was that the defendant had in his possession the alleged stolen property with knowledge that the same was stolen, or that in substance, and not that the defendant received said stolen property with intent to convert the same to his own use.

Affiant further states that this affidavit is made in absolute and perfect good faith, and to the sole and single purpose that justice may be done.

G. L. HINDS.

Signed and sworn to before me this 19th day of June, 1897.

JOHN C. KLEMME,
[SEAL.] *Notary Public, S. D.*

(Endorsement:) Filed June 22nd, 1897. O. S. Pendar, clerk.

23 UNITED STATES OF AMERICA,
District of South Dakota, Southern Division.

UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant.

Joseph A. Colcord, being duly sworn, on oath deposes and says that he was one of the jurors duly empanelled, sworn, and charged in the above-entitled action on the 8th day of June, 1897.

That on the 12th day of June, 1897, said jury, after deliberation, appeared in court, and being interrogated by the court or by the clerk thereof as to whether they had agreed upon a verdict, and being answered in the affirmative by the foreman thereof, the jury, then being required to do so through their foreman, declared the verdict.

That the verdict, as affiant now remembers, was and is in the following form:

"We, the jury, find the defendant guilty as charged in the first count of the indictment."

That said verdict, upon being declared, was received by the court and entered upon the minutes thereof.

That, as this affiant is now advised, said verdict contains
24 and embraces, among other things, the following finding of fact, to wit:

"That the defendant received the alleged stolen property in said indictment with the intent to convert the same to his own use," or that in substance.

That if such be the fact, that said verdict does embrace and make the foregoing finding of fact, the same is not and was not the verdict which this affiant agreed upon in the jury-room, and was not and is not the verdict of the jury.

That the verdict which the jury agreed to and which they sought to return to the court was and is in substance that the defendant received the alleged stolen property knowing the same to be stolen, and that the jury, through this affiant as its foreman, sought to express in the foregoing form of the verdict given on the first page of this affidavit the verdict as just above stated, and it was sought by the jury to express in the verdict as finally declared and received by the court their agreement and verdict in substance that the defendant was guilty of having received stolen property with the knowledge that the same was stolen.

Affiant further states that the jury had no means of knowing what the first count of the indictment charged except the knowledge they derived from hearing the indictment read at the commencement of the trial and from instructions of the court subsequently de-
25 livered; that no copy of said indictment was furnished to the jury nor used in the jury-room during their deliberations.

That if the verdict as declared and received is construed to contain the finding of the intent to appropriate such stolen property to his own use by the defendant, the same is a misunderstanding by

the court as to the meaning the jury sought to convey by the verdict as declared, and that if such verdict as declared and received bears such construction, the same was and is an erroneous declaration of the actual verdict rendered, and that the entry is not and was not the verdict of the jury.

That the verdict of the jury is and was that the defendant received the alleged stolen property with knowledge that the same was stolen, or that in substance, and not that the defendant received said stolen property with intent to convert the same to his own use.

Affiant further states that this affidavit is made in absolute and perfect good faith, and to the sole and single purpose that justice may be done.

JOSEPH A. COLCORD.

Signed and sworn to before me this 18th day of June, 1897.
[SEAL.] FRED E. GRANT,
Notary Public, S. D.

(Endorsements:) Filed June 22nd, 1897. O. S. Pendar, clerk.

26 EXHIBIT "B."

Journal Entries, Pages "1" to "10," Inclusive.

(Journal, p. 275.)

United States District Court for the District of South Dakota, October Term, A. D. 1896.

SIOUX FALLS, SATURDAY, *October* 31*st*, 1896.

THE UNITED STATES *vs.* JOE KIRBY. } No. 557. Arraignment.

Now comes the defendant, with his attorney, F. R. Aikens, and the assistant U. S. attorney moves his arraignment. Thereupon said defendant, by his attorney, waives the reading of the indictment in open court, and to such arraignment asks time until 2 p. m., Nov. 2, to enter his plea, which is granted by the court.

27 (Journal, p. 276.)

United States District Court for the District of South Dakota, October Term, A. D. 1896.

SIOUX FALLS, MONDAY, *November* 2*d*, 1896.

THE UNITED STATES *vs.* JOE KIRBY. } No. 557. Plea.

Now comes said defendant, with his attorney, F. R. Aikens, and files a demurrer to said indictment. This is taken up and argued by F. R. Aikens, for the defendant, and S. B. Van Buskirk, for the

Government, and is overruled by the court; which ruling is excepted to by defendant's attorney.

Thereupon defendant enters his plea of not guilty to said indictment.

28 (Journal, p. 384.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, MONDAY, *April* 19*th*, 1897.

THE UNITED STATES, Plaintiff,
vs
JOE KIRBY, Defendant. } No. 557.

On this day come the United States of America, by James D. Elliott, Esq., attorney for the district of South Dakota, and Stephen B. Van Buskirk, Esq., his assistant, and come- the said defendant in his own proper person and by his attorneys, F. R. Aiken, Esq., and D. R. Bailey, Esq., and, on motion of plaintiff, by its attorney, it is ordered by the court that a jury come to try the issue joined; whereupon the following were selected for the trial of this cause, to wit, Peter Wingen, Peter Becker, Peter Thompson, William Weldele, A. B. Green, John Vosberg, Henry Hartert, Harry Pike, Stephen Kostlan, Frank Wynn, J. W. Hobson, Wendell Obert, twelve good and lawful men of the southern division of the district aforesaid, duly selected, empanelled, and sworn to try the issue joined and a true verdict render according to the law and the evidence.

John Pusey, B. F. Torrey, William Sunderland, Richard S. Willett, and John Fletcher are sworn and duly examined on be-
29 half of the plaintiff.

Time for adjournment having arrived, on motion of the U. S. district attorney, it is ordered that the jury herein be placed in custody of two sworn officers of this court during the trial of this cause, which is done accordingly, and further proceedings in this cause *is* continued until opening of court tomorrow morning.

30 (Journal, p. 387.)

United States District Court for the District of South Dakota, April Term, A. D. 189–.

SIOUX FALLS, TUESDAY, *April* 20*th*, 1897.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day comes the parties to this cause, by their respective attorneys, and the jury heretofore sworn and empanelled, in the custody of the bailiffs; the defendant is present in his own proper person, and the trial proceeds as follows:

Orville Bennett, George H. Jenkins, Delos Lomison, J. J. Ryan,

Elmer G. Leech, J. M. O'Neill, Phil. F. Campbell, H. A. Pratt, A. S. Ellis, B. F. Herington, E. G. Landon, M. Richards, W. E. Smith, W. J. Fenelon, Emmet Burke, James Garrington, and Samuel Saul are duly sworn and examined on behalf of the plaintiff.

Time for adjournment having arrived and the trial of this cause not being completed, further proceedings are continued until tomorrow morning at the opening of court.

31 (Journal, p. 390.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, WEDNESDAY, *April 21st*, 1897.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day again come the parties to this cause, by their respective attorneys, and the jury heretofore sworn and empanelled, in the custody of the bailiffs; the defendant is present in his own proper person, and the trial proceeds as follows:

Oliver S. Pendar, Fred. Stone, B. N. Lister, Madison Haverly, William Toomey, W. C. French, Otto Scherzer, Melville English, J. H. Howe, L. S. Tyler, Wm. Nicoli, M. C. Fosnes, W. E. Reeve, and S. B. Van Buskirk are duly sworn and examined on behalf of the plaintiff.

Here plaintiff rests.

Time for usual adjournment having nearly arrived and this trial not being completed, further proceedings are continued until opening of court tomorrow morning.

32 (Journal, p. 394.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, THURSDAY, *April 22nd*, 1897.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

This day again come the parties to this cause, by their respective attorneys, and the jury heretofore sworn and empanelled, in the custody of the bailiffs; the defendant is present in his own proper person, and the trial proceeds as follows:

Now, at this time, the plaintiff having rested its case, just previous to adjournment of court on yesterday, on motion of defendant, the court makes the following order, to wit:

UNITED STATES
vs.
JOE KIRBY.

This action having come on duly for trial before the court and a jury, at Sioux Falls, South Dakota, on the 19th day of April, 1897, upon the plea of not guilty entered by the defendant, and a jury having been thereupon duly and legally empanelled, sworn, and charged according to law to try such issues and true deliverance make, and after the prosecution had introduced evidence be-
33 fore said jury for the purpose of establishing each of the counts contained in said indictment, and the prosecution having thereupon rested, the defendant, Joe Kirby, moved the court to rule as a matter of law that sufficient evidence had not been introduced to justify the verdict other than that of not guilty as to the charge contained in that part of said indictment referred to by the defendant as the fifth and sixth counts therein and designated by the prosecution as the third count thereof in said indictment, being that part of said indictment relating to the alleged larceny from Waubay post-office and the receiving and possession of the same by the defendant with the intent to convert the same to his own use, he knowing the same to have been stolen therefrom, and the court having sustained said motion:

Now, therefore, the said defendant, Joe Kirby, is adjudged not guilty of the charge mentioned as aforesaid, and that he be discharged therefrom and go hence without day.

And thereupon the said defendant, Joe Kirby, did further move the court that the court rule and hold as a matter of law that the prosecution had not introduced evidence sufficient to justify the verdict other than that of not guilty as to the matters and things set forth in that part of said indictment designated by the defendant as the third and fourth counts, and which has been designated by the prosecution as the second count, being that part of said
34 indictment which relates to the post-office of Miller and the alleged larceny therefrom and the alleged receipt of postage stamps stolen from the said post-office by the said defendant with the intent to convert the same to his own use, he knowing the same to have been stolen, and said motion having been sustained by the court:

Now, therefore, it is adjudged that as to said count in said indictment last aforesaid the said defendant is adjudged not guilty, and that he be discharged therefrom and go hence without day.

By the court:

JOHN E. CARLAND, *Judge.*

Now S. B. Van Buskirk is recalled and examined on behalf of the defendant.

Here defendant rests.

And the said jury, after hearing the evidence and argument of counsel and receiving the charge of the court, retire at 3.30 o'clock

in the afternoon to consider of their verdict, in custody of two bailiffs especially sworn for the purpose.

35 (Journal, p. 399.)

United States District Court for the District of South Dakota, April Term, A. D. 1897.

SIOUX FALLS, FRIDAY, *April 23rd*, 1897.

THE UNITED STATES, Plaintiff,
vs.
JOE KIRBY, Defendant. } No. 557.

Comes the jury into court this day, at about four o'clock in the afternoon, and state to the court that they are unable to agree upon a verdict.

Whereupon the court, being of the opinion that said jury could not agree, discharged them from further consideration of this case.

Endorsed on cover: File No. 16,666. Supreme Court of the U.S., October term, 1898. Term No., 164. Joe Kirby, plaintiff in error, *vs.* The United States. Writ of certiorari & return. Filed December 10, 1898.

No. 164.

NOV 14 1898
JAMES H. McKENNEY,
Clerk.

Motion Papers.

PETITION AND MOTION FOR CERTIORARI.

Filed Nov. 14, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

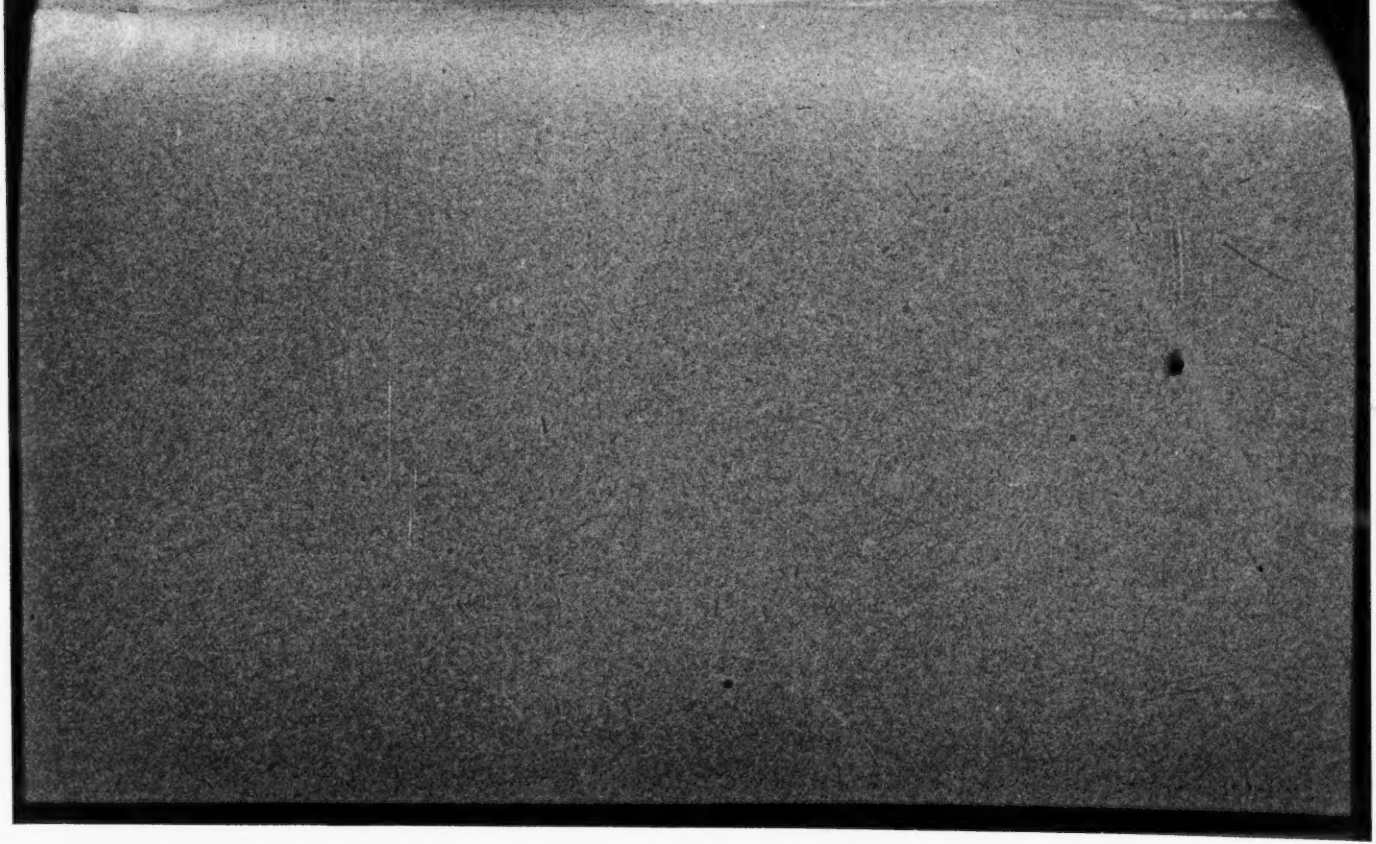
No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

JOE KIRBY, Plaintiff in Error,
vs.
THE UNITED STATES.
No. 164.

1

MOTION AND PETITION FOR CERTIORARI.

To the Honorable, the Supreme Court of the United States:

And now comes the Plaintiff in Error and suggests to the court here that the record as certified to this court does not correctly state all the matters and things purported to be certified, and omits to state certain material matters which are essential to the proper consideration of the questions presented by the writ of error to this court for review upon the exceptions taken by the Plaintiff in Error at the time of his trial in the district court for the district of South Dakota. And thereupon the Plaintiff in Error shows:

I. That the statement upon the 9th page of the printed record that "the jury being sworn in said cause, counsel for the defendant files a motion to discharge the defendant for the reason that the defendant has already been placed in jeopardy for the offence for which he is now to be tried", is not a correct statement in this that the said motion to discharge the Plaintiff in Error, to be found on pages sixteen and seventeen of the record was in fact filed, heard and over-ruled by the court before the jury was sworn, as appears from the annexed affidavits.

II. Also in that it appears upon page eighteen of the record that the Plaintiff in Error filed a motion in arrest of judgment, and in support of the 7th clause thereof, and submitted certain affidavits of the jurors who rendered the verdict. That upon presenting said motion in arrest of judgment, the court, upon motion of the United States District Attorney, struck out said 7th clause and refused to consider the same, to which ruling the Plaintiff in Error duly excepted, as appears by page twelve of the record, and that this court cannot pass upon the matter of said exception as presented by

2

Assignment of Errors XXI and XXII, page 107 of the printed, without said affidavits being certified in the record. The said record does not certify said affidavits to this court, although

they are still existing among the files of the case in said district court and in the custody and control of the clerk thereof, copies of which affidavits are hereunto attached as a part of this motion.

III. In that it appears all the matters and things mentioned in the said plea of former jeopardy as set forth on pages sixteen and seventeen of the printed record, appear of record in this case in the trial court, and that the record of the trial court in this action shows that on the twenty-third of April, 1897, upon the former trial of this action, upon the plea of not guilty to the same indictment as is and was used upon the trial of the present action, which former trial resulted in a disagreement of the jury charged with said trial, said jury were brought into court, discharged from the further consideration of said case, which said discharge of the jury at that time Plaintiff in Error claims was ordered by the court during his absence and the absence of his counsel, and without his consent and against his wish and desire, and that the discharge of the jury the Plaintiff in Error insists was improper for that reason and otherwise, and hath ever claimed that he was thereby placed in jeopardy by the fact of that trial and was entitled to a discharge from further liability on account of said indictment, and said discharge of the jury being without his knowledge of consent and without good or sufficient cause therefor, all of which at large and more fully appears from the records of said court still existing, and the Plaintiff in Error is advised that the case cannot properly be considered in this court unless this court shall have before it the record of said former
3 trial, none of which has been certified in the record to this court.

WHEREFORE, the Plaintiff in Error prays that a writ of certiorari issue out of this court directed to the said district court of the district of South Dakota and the clerk thereof, requiring said court and clerk to certify truly to this court as to all the matters and things above set forth, and that the record as now certified be returned to said court for correction in the particulars mentioned.

And the Plaintiff in Error further shows that the transcript of record was not printed in this case until after the adjournment of the last term of court, that until the fifteenth day of September, inst., the Plaintiff in Error and his counsel all resided at Sioux Falls in the State of South Dakota, and until the printing of the record it could not be conveniently examined, and the contents thereof were, until said record was so printed, unknown to the Plaintiff in Error and his counsel.

JOE KIRBY,
Plaintiff in Error.

CHARLES O. BAILEY,
A. G. SAFFORD,
Of Counsel.

STATE OF SOUTH DAKOTA, } ss.
County of Minnehaha, }

I, Joe Kirby, being first duly sworn do on oath depose and say that I am the Plaintiff in Error in the above entitled proceeding

and that I know the contents of the foregoing and that the facts therein stated are true of my own knowledge.

JOE KIRBY,

Subscribed and sworn to before me this twenty-third day of September, 1898.

4 [NOTARIAL SEAL.] J. M. DONOVAN,
Notary Public, S. D.

UNITED STATES OF AMERICA, } ss.
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES, }
vs. }
JOE KIRBY. }

G. S. HINES, being duly sworn on oath, deposes and says that he was one of the jurors duly empanelled, sworn and charged in the above entitled action on the 8th day of June, 1897.

That on the 12th day of June, 1897, said jury after deliberation appeared in court, and being interrogated by the court or by the clerk thereof as to whether they had agreed upon a verdict and being answered in the affirmative by the foreman thereof, the jury then being required to do so through their foreman, declared the verdict.

That the verdict as affiant remembers was and is in the following form:

"We, the jury, find the defendant guilty as charged in the first count of the indictment."

That said verdict upon being declared was received by the court and entered upon the minutes thereof.

That as this affiant is now advised said verdict contains and embraces among other things the following Finding of Fact, to-wit:

"That the defendant received the alleged stolen property in
5 said indictment with the intent to convert the same to his own use," or that in substance.

That if such be the fact that said verdict does embrace and make the foregoing Finding of Fact, the same is not and was not the verdict which this affiant agreed upon in the jury room and was not and is not the verdict of the jury.

That the verdict which the jury agreed to and which they sought to return to the court was and is in substance that the defendant had in his possession the alleged stolen property knowing the same to be stolen and that the jury through their foreman sought to express in the foregoing form of the verdict given on the first page of this affidavit the verdict as just above stated. And it was sought by the jury to express in the verdict as finally declared and received by the court their agreement and verdict in substance that the defendant was guilty of having in his possession the alleged stolen property with the knowledge that the same was stolen.

Affiant further states that the jury had no means of knowing what the first count of the indictment charged except the knowledge they

derived from hearing the indictment read at the commencement of the trial and from instructions of the court subsequently delivered. That no copy of said inditment was furnished to the jury, nor used in the jury room during their deliberations.

That if the verdict as declared and received is construed to contain the finding of the intent to apporpriate such stolen property to his own use by the defendant the same is a misunderstanding by the court as to the meaning the jury sought to convey by the verdict as declared and that if such verdict as declared and received bears such construction the same was and is an erroneous declaration of the actual verdict rendered. and that the entry is not and was not the verdict of the jury.

That the verdict of the jury is and was that the defendant had in his possession the alleged stolen property with knowledge that the same was stolen, or that in substance, and not that the defendant received said stolen property with intent to convert the same to his own use.

Affiant further states that this affidavit is made in absolute and perfect good faith, and to the sole and single purpose that justice may be done.

G. S. HINDS.

Signed and sworn to befere me this 19th day of June, 1897.

[NOTARIAL SEAL.] JOHN C. KLEMME,
Notary Public, S. D.

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss.
Eighth Judicial Circuit, District of South Dakota, }

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do hereby certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

OLIVER S. PENDAR.
Clerk.

UNITED STATES OF AMERICA, } ss.
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES, }
vs. }
JOE KIRBY. }

STATE OF SOUTH DAKOTA, } ss.
County of Moody. }

I, the undersigned, being first duly sworn, do on oath depose and

say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the
7 jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

First, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

Second, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

Third, Did the defendant receive those stamps knowing them to be stolen?

Fourth, Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
8 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that as said special finding did not in any manner find the befendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow jurors, that several if not all of his fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty

of intending to convert the property alleged in the indictment to be stolen or any part thereof to his own use or gain: that upon returning to the jury room the last time after having rendered such special verdict as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted, or as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict and no more, and
9 thereupon upon coming into court the last time when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain. That if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain; your affiant says that in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

JOHN RICE.

Signed and sworn to before me this 18th day of June, 1897.
[NOTARIAL SEAL.] F. L. ROWLAND,
Notary Public, S. D.

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss.
Eighth Judicial Circuit, District of South Dakota, }

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do hereby certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

OLIVER S. PENDAR.
Clerk.

[Seal.]

UNITED STATES OF AMERICA, } ss.
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES, }
vs.
JOE KIRBY. }

STATE OF SOUTH DAKOTA, } *ss.*
County of Aurora. }

I, the undersigned, being first duly sworn, do on oath depose and say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the
10 jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

First, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

Second, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

Third, Did the defendant receive those stamps knowing them to be stolen?

Fourth, Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
11 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that as said special finding did not in any manner find the befendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and con-

fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen or any part thereof to his own use or gain: that upon returning to the jury room the last time after having rendered such special verdict as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted, or as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict and no more, and
12 thereupon upon coming into court the last time when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain. That if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain; your affiant says that in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

E. FERGUSON.

Signed and sworn to befere me this 18th day of June, 1897.
[NOTARIAL SEAL.] S. D. BROWN,
Notary Public, S. D.

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, } ss.
Eighth Judicial Circuit, District of South Dakota, }

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do hereby certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

[SEAL.] OLIVER S. PENDAR,
Clerk.

UNITED STATES OF AMERICA, } ss.
District of South Dakota, }

In District Court Thereof, Southern Division.

UNITED STATES, }
vs. }
JOE KIRBY. }

STATE OF SOUTH DAKOTA, } ss.
County of Clay. }

I, the undersigned, being first duly sworn, do on oath depose and say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means was given said jury or any of the
13 jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

First, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

Second, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

Third, Did the defendant receive those stamps knowing them to be stolen?

Fourth, Did the defendant intend to convert said stamps to his own use?

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
14 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that said special finding did not in any manner find the befendant guil-

ty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow jurors, that several if not all of his fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty of intending to convert the property alleged in the indictment to be stolen or any part thereof to his own use or gain: that upon returning to the jury room the last time after having rendered such special verdict as aforesaid, Mr. Glass insisted that he should want to find two of the counts as above indicated against the defendant; that none of said jurors thereupon attempted, or as your affiant has reason to believe, intended to find that the defendant intended to convert said stolen property or any part thereof to his own use or gain; that thereupon we agreed upon the state of facts which we found against the defendant as stated in our special verdict and no more, and thereupon upon coming into court the last time when the verdict of guilty was announced, the foreman of said jury announced said verdict of guilty as charged in the first count; that it was at all times the intent of said foreman and the understanding and agreement of said jurors that said verdict did not and should not exceed in its findings that found in the special verdict and that your affiant never learned until after said jury had been discharged that it was the claim of the prosecution that by returning the verdict of guilty that we in effect found that defendant intended to convert said property to his own use or gain. That if such is the legal effect of said verdict such verdict is a mistake and does not express the facts as agreed to by said jury in the jury room; that said jury never agreed that the said defendant intended to convert said stamps or any part thereof to his own use or gain; your affiant says that in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding defendant guilty of intending to convert said stamps or any part thereof to his own use or gain.

J. H. DWYER.

Signed and sworn to befere me this 18th day of June, 1897.
[NOTARIAL SEAL.] C. A. CHISTOPHERSON,
Notary Public, S. D.

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA, }
Eighth Judicial Circuit, District of South Dakota, } *ss.*

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do here-

by certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

[SEAL.] OLIVER S. PENDAR,
Clerk.

UNITED STATES OF AMERICA, *District of South Dakota,* } *ss.*

In District Court Thereof, Southern Division.

UNITED STATES, *vs.* JOE KIRBY.

STATE OF SOUTH DAKOTA, *County of Beadle.* } *ss.*

I, the undersigned, being first duly sworn, do on oath depose and say; that I am one of the jurors duly empannelled and sworn and charged in the above entitled action on the 8th day of June, 1897, and that neither the indictment or any copy thereof was furnished to the jury, and that no means, except the reading of the indict-
16 ment to the jury at opening of trial, was given said jury or any of the jurors by which to determine what was charged in the respective counts thereof; that I heard the word "count" used by the defendant in his objection to the evidence and also heard the word "count" used by the court, and that the court instructed us, as I understood it, that there was four counts therein submitted to the jury on which to pass, and that if we found them all against the defendant we should find him guilty as charged in the indictment that had been read to us; that each of said counts as I understood the court to charge us was as follows:

First, Were the stamps mentioned in the indictment stolen from the post office at Highmore?

Second, Were the parties who stole the stamps from the post office at Highmore, convicted at Deadwood?

Third, Did the defendant receive those stamps knowing them to be stolen?

Fourth, Did the defendant intend to convert said stamps to his own use?

That affiant understood that the third paragraph above was the only proposition contained in the first count of said indictment.

That affiant understood that each of said charges as above named constituted a count in said indictment; that upon the jury retiring to deliberate upon the close of the trial, the vote of the jury as to whether we should find the defendant guilty as charged in the indictment, was a major portion of the time six each way, and that part of the time seven of the jury voted "Not Guilty." That said jury and the different members thereof in said voting as your affiant understood

it, never intended to find that said defendant ever intended to convert any of said stamps to his own use or gain. That finally, about five o'clock on June 12th, 1897, the jury being unable to agree upon a general verdict, prepared a special verdict, to which in the jury room they all agreed, which special verdict was reported into court and entered upon the minutes of the court under the direction of the jury, but thereafter and before the jury was discharged
18 from the case one of the jurors, Mr. Glass, dissented. That at the time said special verdict was reported as aforesaid the court made some remark about whether the jury intended to find the defendant guilty as charged in the first count of the indictment; that as said special finding did not in any manner find the befendant guilty of intending to convert to his own use or gain the alleged stolen property or any part thereof, your affiant understood the remark of the court as meaning, that we could arrive at the same result as our special finding indicated by finding the defendant guility as charged in the first count; that on returning to the jury room your affiant believed, and has reason to believe from the remarks and conversations had with his fellow jurors, that several if not all of his fellow jurors, believed that the charges against the defendant of intending to convert said alleged stolen property or any part thereof to his own use on gain was not included in the first count of said indictment, and that it was the intent of this affiant, and as he believes of all his fellow jurors, that by returning a verdict of guilty as charged in the first count, they would not find the defendant guilty of intending to convert the property alleged in the indictment
19 to be stolen or any part thereof to his own use or gain.

That your affiant says in his opinion there was no evidence whatever that would justify him under his oath as a juror either directly or indirectly of finding said defendant Joe Kirby guilty of intending to convert the said property alleged to be stolen to his own use or any part thereof, but that your affiant does believe and did believe at the time from the evidence that the said defendant did not at any time intend to convert said property to his own use, gain or otherwise; that after said jury had been discharged on the morning of June 16th, 1897, your affiant learned for the first time when the affidavit was presented to him that it was the claim of the prosecution that the verdict as returned by said jury in effect found the defendant guilty among other things of intending to convert said property to his own use or gain; that if such is the legal effect of such verdict, such verdict is a mistake and fails to express the intent of the jury when the same was returned; that had the affiant understood that the charge of having said property with intent to convert the same to his own use and gain was contained in the first count of said indictment your affiant would never have consented to such a verdict, and, in order that justice may be done, your affiant is ready and willing to appear in open court and does hereby offer to appear in open court to testify as to the matters and things aforesaid.

That I have read the foregoing affidavit and that the same is in all respects true and as I desire it to be made.

JOSEPH A. COLEND.

Signed and sworn to before me this 16th day of June, 1897.
[NOTARIAL SEAL.] FRED. E. GRANT,
Notary Public, S. D.

(Endorsed:) Filed June 22nd, 1897. O. S. Pendar, clerk.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, District of South Dakota, } *ss.*

I, Oliver S. Pendar, clerk of the district court of the United States of America, in and for the district of South Dakota, do here by certify, that I have carefully compared the foregoing copy with the original hereof which is in my custody today as such clerk, and that such copy is a correct transcript from such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Sioux Falls, in said district, this 8th day of December, A. D., 1897.

[SEAL.] OLIVER S. PENDAR,
Clerk.

UNITED STATES OF AMERICA,
In Supreme Court.

JOE KIRBY, *Plaintiff in Error,*
vs.
UNITED STATES,

STATE OF SOUTH DAKOTA,
County of Minnehaha. } *ss.*

We, the undersigned, being each duly and severally sworn, do, each for himself, depose and say:

That I am an attorney and counsellor at law and as such engaged in the active practice of my profession, and as such appeared for the said Plaintiff in Error, Joe Kirby, in the trial court, and conducted his defense therein, and that I have persoonal knowledge of the facts herein stated. That the record as printed for this court, a copy of which is now before me, shows that the plea of former jeopardy interposed on the part of the Plaintiff in Error, and which plea was in writing, was not so presented until after the trial jury had been empanneled and charged with the case. That said record is in this respect incorrect. That immediately on June 8th, 1897, upon said action being called and before a jury was called for the trial of said action, the said plea of former jeopardy as appears by pages 16 and 17 of the printed record was presented to the court and filed with the clerk and the questions raised thereby ruled upon by the court and exception taken and allowedto such ruling before the jury was called for the trial of this action.

FRANK R. AIKENS.
D. R. BAILEY.

Subscribed and sworn to before me this 31st, day of August, 1898.
[SEAL, NOTARY PUBLIC.] H. E. JUDGE,
Notary Public.

Office Supreme Court U. S.
FILED
JAN 19 1899
JAMES H. McKENNEY,
Clerk.

No. 164.

Brf. of Safford & Bailey for P. E.

BRIEF FOR PLAINTIFF IN ERROR.

Filed Jan. 19, 1899.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

A. G. SAFFORD,
C. O. BAILEY,
of Counsel.
JOE KIRBY, Pro. Per.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 164.

JOE KIRBY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff was indicted by the grand jury of the District Court of the United States for the Southern Division of the District of South Dakota, at the term of said Court, held at the city of Sioux Falls on the third Tuesday of October, 1896, for an alleged violation of the second section of the act of Congress of March 3, 1875, (18 Stat. at L., 470,) entitled, "An Act to Punish Certain Larcenies, and the Receivers of Stolen Goods." (3.)

The indictment contained, as conducted by the prosecution, three counts, and by the plaintiff in error, six. The case has proceeded upon the theory that the plaintiff in error was charged therein with feloniously receiving and having in his possession, with intent to convert the same to his own use and gain, certain postage stamps which had been, as was said, before that time stolen from the post offices at Highmore, Miller and Waubay, all in the State of South Dakota; the first count, as claimed by the prosecution, was based upon stamps said to have been stolen from the post office at Miller, and the third on those said to have been stolen from Waubay. The plaintiff interposed a demurrer to the indictment; the demurrer was overruled. (7.)

The plaintiff in error, having plead not guilty, was put upon trial at the April Term, 1897, and the cause was fully heard and submitted to the jury upon the Highmore count of the indictment only, the presiding judge having ordered a verdict of not guilty on April 19th as to the Miller and Waubay counts. It appears that at that trial after the case had been submitted to the jury, and while the defendant was at large upon bail, and while both himself and his counsel were absent from the court room, the jury returned and informed the presiding judge that they were unable to agree upon a verdict, and the presiding judge, without notifying either the plaintiff in error or his counsel, and in their absence, as aforesaid, received the report of the jury, and discharged them from further consideration of the case, without the knowledge or consent of the plaintiff in error or his counsel.

At a term of the Court, and in June, 1897, (claimed by the prosecution to be an adjournment of the April term,) the plaintiff in error was again put upon trial upon the alleged first count in said indictment; for this trial the presiding judge summoned a new and special jury. (15.) The plaintiff in error interposed a challenge to the whole array of jurors, claiming it was not an impartial jury of the state and district, according to Article 6 of the Amendments to the Constitution of the United States. It appears that the presiding judge ordered the clerk and jury commissioner to draw the special jury to try the plaintiff in error, from the box from names selected from the body of the Southern Division of the District of South Dakota, *exclusive of the corporate limits of the city of Sioux Falls*, where defendant is accused of having committed the crime. The reason given for this extraordinary order was "that the records of the court show that said plaintiff in error has once been tried for the offence charged in the indictment, and said trial resulted in a disagreement of the jury:" The challenge to the array of jurors was denied.

The plaintiff in error then interposed a plea in abatement and praying that this action be dismissed, (16) claiming substantially that the trial which had taken place before that time, when the presiding judge had received the report of the jury that they were unable to agree, and had discharged them from further consideration of the case, in the absence of and without the knowledge or consent of the plaintiff in error or his counsel, operated to place the plaintiff in error once in jeopardy for the offence claimed to have been committed by him with reference to the postage stamps said to have been stolen from the post office at Highmore, and claiming that the second trial was in effect placing him twice in jeopardy contrary to the provision of Article V of the Amendments to the Constitution of the United States. No issue to this plea was taken by the prosecution, but the presiding judge summarily held that the provision of the Constitution above referred to did not apply to the situation, and that the former trial did not place the plaintiff in error once in

jeopardy, it not being necessary, as he ruled, that the plaintiff in error or his counsel should have been present when the former jury was discharged, and for that reason, overruled the motion.

Thereupon the trial proceeded. Mr. O. S. Pendar, the clerk of the Court, was sworn as a witness on behalf of the prosecution, (20) and before any evidence was introduced, the plaintiff in error objected to the introduction of any testimony under the said first count of the indictment, it being upon that count of the indictment only that the plaintiff in error was put upon trial, for the following reasons:

1. That the count upon which the plaintiff in error was placed on trial did not state facts sufficient to constitute a crime committed by the defendant of which the Court had jurisdiction, or otherwise.

2. That said count did not inform the defendant of the nature and cause of the accusation against him, as required by Article VI of the Amendments of the Constitution of the United States and that to require the plaintiff in error to proceed to trial upon said count would be to deprive him of his liberty or property without due process of law, as provided by Article V of the Amendments to the Constitution of the United States.

3. That said count was defective and did not charge the plaintiff in error with having committed any public offense or crime against the law of the land of which the Court had jurisdiction, or otherwise, which objections were overruled by the Court.

And thereupon, and before the introduction of any testimony, the plaintiff in error further objected to the introduction of any testimony under said indictment, for the reasons, (a) that it does not state sufficient facts to constitute a crime; (b) that it does not inform the plaintiff in error of the nature of the accusation against him, and to require him to proceed with the trial would be to deprive him of his liberty or property without due process of law; (c) that it was defective and did not charge the plaintiff in error with having committed any public offense; (d) that section 2 of the Act of March 3, 1875, is unconstitutional and not according to due process of law or the laws of the land, "and especially in so far as the same attempts to make the judgment of conviction of the principal felon, conclusive evidence in the prosecution against the receiver of the property, that the property therein described has been embezzled, stolen, or purloined;" (e) that said count was defective and did not purport to accuse the plaintiff in error of the commission of any crime, and referred to things set forth in other counts for substantial matters; (f) that the indictment is defective in that it does not state from whom said stamps were received, nor that said stamps or other property was the property of the United States at the time the plaintiff in error was charged with receiving of the same, nor does it charge that they were of any value. All of said objections were overruled.

The witness, Pendar, thereupon testified that he was clerk of the District Court for South Dakota, and had charge of the records and of the records of September Term, 1896, held at Deadwood, and produced the records and files which he testified were the original records and files of the court, and thereupon the prosecution offered in evidence page 23 of the Journal of the Court, referred to and produced by the witness Pendar; said records and files so produced and offered were the records of the indictment in the case of the United States against Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll and Frank King, said defendants being the persons who it was claimed were the principal felons who participated in the robbery of the Highmore, Waubay and Miller post offices. The plaintiff in error objected to the production of the record (22), for the reason that no proper foundation had been laid for the proof of the indictment by the record copy, the indictment itself not having been offered in evidence, and there being no explanation in regard to its non-production. This objection was overruled by the Court. The prosecution then offered the indictment in evidence, (22, 23). To the offer of this indictment in evidence the plaintiff in error interposed his objections, generally that it was incompetent, irrelevant and immaterial and did not conform to the allegations contained in the indictment upon which the plaintiff in error was then on trial, and for the particular reason that the act of Congress, approved March 3, 1875, under which it was sought to introduce this exhibit, was unconstitutional, because the plaintiff in error was entitled upon this trial to be confronted with the witnesses called against him, as provided in Article V of the Constitution of the United States, and that the second paragraph of the second section of the Act of March 3, 1875, which provides as follows:

"And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be *conclusive evidence* in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen or purloined," is violative of that constitutional provision. The presiding judge held that the paragraph of said act above quoted was not violative of said provision of the Constitution, and admitted the testimony.

The witness Pendar, thereupon proceeded (24, 25, 26, 27, 28, 29) to introduce against the objections of the plaintiff in error, based upon the constitutional provision, and for the other reasons last above stated, the records of the court showing, as was said, the presentment, arraignment and conviction of the principal felons for the robbery of the said post offices—two on the plea of guilty, and one on the verdict of a jury.

The witness, Pendar, had no personal knowledge whatever in regard to said robbery, and was only the medium through which the conviction of said principal felons was proven, as provided in the

second paragraph of the second section of the law of March, 1875, and this was the only evidence in the case that there had been a robbery of the post office at Highmore; that postage stamps of the United States had been stolen therefrom by any one, or that the stamps so said to have been stolen were the property of the United States on the 7th day of June, 1896.

Other witnesses were thereupon called and sworn as follows: V. M. Lister, M. Haverly, W. C. French, William Twomey, M. L. English and Ben. P. Hoover. None of these witnesses knew anything in regard to the robbery of the post office at Highmore, nor do they appear to have known the plaintiff in error, or anything whatever in regard to his alleged receipt of the fruits of that robbery; they testified to seeing the principal felons, some of whom they recognized, and some they did not, at different points along the route between Highmore and Gettysburg, South Dakota, from which point, it was claimed, that one of the felons sent an express package containing the stamps to the plaintiff in error at Sioux Falls, by express. Numerous objections were taken during the introduction of the testimony of these witnesses to the testimony given by them, which objections were overruled.

J. H. Howe, the agent of the express company at Gettysburg, L. S. Tyler, the agent of the express company at Sioux Falls, W. G. Nicoli, the delivery clerk for the express company at Sioux Falls, were called and testified to the transporation of the package from Gettysburg to Sioux Falls, and its delivery. These witnesses, like the others, had no knowledge whatever of the robbery at Highmore, and were none of them able to identify the man who left the package at Gettysburg as being one of the convicted felons, although they did identify some of them. None of these witnesses knew anything in regard to the plaintiff in error, excepting that his name appeared upon the records of the express company as being the consignee of the package, and it was not shown that any one had personal knowledge that the plaintiff in error received the package, nor was it shown that the express receipt bearing his name was in fact signed by him. Numerous objections were taken to the testimony of these last witnesses, which were overruled by the Court.

M. C. Fosness was called and sworn on behalf of the prosecution. He was the Post Office Inspector who had charge on the part of the government of the cases against the principal felons and the plaintiff in error; he had no personal knowledge of the robbery at Highmore, excepting only the hearsay statements which had been made to him while he was at work upon the case; He was permitted (70) to testify to the fact that the post office at Highmore had been robbed on June 7, 1896; the plaintiff in error seasonably objected to this testimony, but the Court permitted him to testify to that fact, although it appeared that his only knowledge in regard to the fact was a telegram received by him at Aberdeen, the morning after the alleged robbery, and such facts as he subsequently ascertained

from persons who were not called as witnesses. The principal part of the testimony of this witness was directed to conversations he had with the plaintiff in error, and it is solely to the evidence of this witness that the question of guilty knowledge and criminal intent on the part of the plaintiff in error must be directed. Against the seasonable objection of the plaintiff in error, this witness was permitted to testify in regard to the robberies at Miller and Waubay, of which charges the plaintiff in error had been acquitted on the preceding trial. Numerous other objections were made to the testimony of this witness, which were overruled by the Court.

S. B. Van Buskirk, the Assistant District Attorney for that district, was also called as a witness; but his evidence was in every respect favorable to the plaintiff in error.

No other witnesses were examined or evidence introduced.

The plaintiff in error (89) made several motions in regard to striking out impertinent and improper testimony, which motions were overruled by the Court, and moved the Court to instruct the jury to acquit the plaintiff in error, because of the insufficiency of the indictment and because there was no sufficient evidence to warrant the jury in returning a verdict of guilty (90).

The plaintiff in error requested the Court to give certain instructions (90), which were refused. Thereupon the Court charged the jury (91, 92, 93, 94, 95, 96 and 97), which was excepted to by the plaintiff in error.

The jury (no copy of the indictment being furnished them) retired to consider their verdict, and returned and informed the Court that they had agreed upon a verdict as follows, which was entered on the minutes of the Court:

"We, the jury in the case of the United States vs. Joseph Kirby, defendant, find the defendant, Joseph Kirby, guilty of having in his possession stolen property belonging to the United States, as claimed in the indictment, knowing them to be so."

This verdict omitted from its finding the fact that the plaintiff in error had the stolen property in his possession with intent to convert the same to his own use, and thereupon the Court (96) said to the jury:

"Gentlemen of the jury, in regard to the form of the verdict, of course, if the jury decides to find a special verdict, all the members of the jury will have to unite upon the findings of fact, and it would have to be technically correctly drawn up. Do I understand from the foreman that the jury finds the defendant guilty of having in his possession stolen property as charged in the first count of the indictment?"

To which the foreman of the jury replied. "That is our decision, your Honor."

Thereupon the Court directed the verdict to be entered in the following form:

"We, the jury in the case of the United States vs. Joseph Kirby, find the defendant, Joseph Kirby, guilty of having in his possession property of the United States, knowing it to have been stolen, as charged in the first count of the indictment."

The plaintiff in error objected to the form of the verdict as given by the Court and insisted upon the record of the verdict as given by the jury. Thereupon (98) the Court said:

"Gentlemen of the jury, the verdict that you have returned does not state facts sufficient to formally express what you have expressed to the Court that you find. You have either a right to find him guilty or not guilty as charged in the first count of the indictment; or, if you see fit, you may find the facts."

To this the foreman of the jury responded:

"Your Honor, we, the jury, find this case just as I have stated it, and I was instructed by the jurymen to give it in that way."

After this conversation the jury was polled, eleven replying in the affirmative and one in the negative; the jury then retired and afterward returned a general verdict that the plaintiff in error was "guilty of the charges as contained in the first count of the indictment."

ASSIGNMENT OF ERRORS.

The plaintiff in error assigned twenty-three errors (100–107). They were substantially as follows:

(a.) That he was convicted upon an insufficient indictment.

(b.) That he had once been placed in jeopardy for the same offense.

(c.) That the jury was not a constitutional jury.

(d.) That the charge was based on an unconstitutional statute.

(e.) That the essential ingredients of the offense were not attempted to be proven by the witnesses whom it was claimed had knowledge of those facts, but by the record of the trial of the principal felons, as shown by the court records.

(f.) That the statute of March 3, 1875, authorizing proof of a conclusive character as to the character of the goods, is unconstitutional.

(g.) That the witnesses called at the time of the trial were permitted to give improper testimony, as is fully set forth in the record, and especially that the Court erred (70) in allowing the witness Fosness to testify that he knew of the fact of the postoffice robbery at Highmore, such knowledge being acquired exclusively by hearsay; and, further (74), in allowing the same witness to testify in substance that he had a conversation with the plaintiff in error in which he accused him of receiving packages from the thieves from Aberdeen just after the robberies at Miller and Waubay, and that the plaintiff in error seemed greatly surprised at such accusations.

(h.) In admitting in evidence plaintiff's exhibit "O" (64), be-

ing a purported receipt of a package consigned by the American Express company from Gettysburg, S. D., to the plaintiff in error, and especially permitting, without identification, the same, containing a purported receipt by Joe Kirby, to be presented to the jury.

(i.) The Court further erred in admitting in evidence and refusing to strike out the testimony of William Nicoli (68), which was in substance that he believed that on the 9th day of June, 1896, he delivered a package, shipped from Gettysburg, at Mr. Kirby's office, but that he had no personal knowledge thereof.

(j.) Because the Court refused to instruct the jury, as requested by the plaintiff in error, as follows (91): "Recent unexplained possession by the defendant of stolen property may be evidence from which the jury would be justified in finding the defendant had committed the crime of larceny; but in order to justify a verdict other than not guilty upon the charge in the indictment upon which the defendant is now on trial it is necessary for the prosecution to show that the defendant had knowledge that the property had been stolen. The burden is on the prosecution to show such knowledge, and not on the defendant to show want of it."

(k.) Because the Court refused to give the following instruction (91), as requested by the plaintiff in error: "In order to establish the crime charged in the indictment upon which this defendant is now on trial it is necessary for the prosecution, not only to satisfy you beyond a reasonable doubt that the property which the defendant is charged with receiving was then stolen property, but it is likewise necessary for it to prove that the defendant had knowledge at the time he received such property that the same was stolen, and with such guilty knowledge from the thief and as the testimony of Mr. Howe, the express agent at Gettysburg, who claims one E. Baxter (60) sent the package which the government claims contained the stolen property, and as no attempt has been made by the prosecution to connect the said E. Baxter in any manner with the alleged thief, nor to identify him as being the Ed Baxter, the record of whose conviction is set forth, and as the testimony of Mr. French (41) likewise tends to show that a party named Baxter, other than the Baxter the record of whose conviction is before you, was at Gettysburg at the same time; and as the testimony of Mr. Fosness as to Mr. Kirby's statement in response to his, or Mr. Miller's, inquiry as to what the package contained, merely stated that it contained property that Mr. Fosness was seeking for; and such statement, while it might tend to show Mr. Kirby's opinion then that he had the stamps stolen from Highmore, still it could not be taken as an admission that he had received such property from the thief, nor that at the time that he had received it that he had any guilty knowledge of the theft of such property, and therefore you are instructed to return a verdict of not guilty."

(l.) Because the Court improperly charged the jury (93), "that

the record of the conviction of the thieves established a *prima facie* case on the part of the government."

(m.) Because the Court refused to charge the jury in accordance with the first request of the plaintiff in error (90), to the effect that as no issue had been raised by the prosecution with the plea of former jeopardy (16–17), it was their duty thereunder to return a verdict in his favor.

(n.) Because the Court refused to receive the verdict offered by the jury.

(o.) Because the Court improperly interfered with the functions of the jury in the matter of rendering their verdict.

(p.) Because the Court refused to consider the affidavits of the jurors as to their verdict.

(q.) Because the Court overruled the motion in arrest of judgment.

(r.) Because the trial court did not have jurisdiction of the plaintiff in error or the subject matter of indictment.

BRIEF AND ARGUMENT.

I.

There can be no question as to the jurisdiction of this Court to review upon writ of error the questions presented in this case.

Section 5 of the act of March 3, 1891, as amended by the act of January 20, 1897, establishing Circuit Courts of Appeal and regulating appeals to that court and to the Supreme Court of the United States, provides that appeals or writs of error may be taken from the District Courts directly to the Supreme Court in the following cases:

"In any case that involves the construction or the application of the Constitution of the United States."

"In any case in which the constitutionality of any law of the United States * * * is drawn in question."

The construction and application of the V and VI articles of amendment to the Constitution were involved in the trial of this case. At every step in the progress of the trial the plaintiff in error interposed objections that his rights and privileges guaranteed by those sections of the Constitution were being invaded and trampled upon.

The law of March 3, 1875, which permits conviction on certificate and attempts to do away with the constitutional provision that the accused "shall be confronted with the witnesses against him" was involved, and the application of that statute by the Court in dispensing with the evidence of witnesses to show the property claimed to have been stolen was stolen, and that it was the property of the United States, was specifically objected to.

Specific objection was also made to the statute, Section 800 *et seq*, R. S., providing for the drawings of juries under which the

presiding judge attempted to designate the district or parts of the district from which the jury in the case should be drawn; but the application of the law in regard to drawing juries to this case was objected to as being violative of the constitutional requirements as to the drawing of jurors, as provided for in the Constitution.

The constitutional objections and questions involved in the case are discussed hereafter.

II.

When a writ of error is taken directly to this Court under Section V of the act of March 3, 1891, in a case in which the constitutionality of a law of the United States is involved, this Court acquires jurisdiction of the whole case and of all the questions involved in it, and not merely the question of the constitutionality of the law.

Horner vs. U. S., 143 U. S., 570.

III.

The finding of a sufficient indictment by a grand jury is jurisdictional and a right of which accused cannot under the constitution be deprived.

Re Bain, 121 U. S., 1.

The first count in the indictment under which the plaintiff in error was convicted is fatally defective:

(a.) Every ingredient of which the crime is composed must be actually and clearly alleged.

U. S. vs. Cook, 17 Wall, 174.
U. S. vs. Cruikshank, 92 U. S., 542.
Regina vs. Martin, 9 C. & P., 215.

(b.) The ownership of the property of the United States is a jurisdictional question; the federal courts could have no jurisdiction of larcenies unless the government of the United States was in some way, interested; in the legislation of March 3, 1875, congress undertook to punish larcenies of United States property, and also the receivers of such property; therefore, the ownership of the property stolen is fundamental and jurisdictional, and such ownership *at the time the crime is charged to have been committed* must be distinctly alleged and proved.

Afferbach vs. McGovern, 21 Pac. Rep. (Cal.), 837.
Fredericks vs. Tracey, 33 Pac. Rep. (Cal.), 750.
Miller vs. People, 13 Colorado, 166.
State vs. Lyon, 17 Wis., 237 (245).
People vs. Vice, 21 Cal., 345.
Higgins vs. State, 19 S. W. Rep., 503.
State vs. Ellis, 24 S. W. Rep., 1017.
State vs. Lathrop, 15 Vt., 279.
Thomas vs. State, 22 S. E. Rep., 956.
Moultier vs. State, 20 So. Rep., 554.

(c.) It is not alleged in this indictment that the postage stamps said to have been stolen at Highmore were the property of the United States at the time the indictment charges the plaintiff in error with having received said stamps. The allegation is this substantially: that the principal felons, on the 7th day of June, 1896, broke into the postoffice at Highmore and then and there stole certain postage stamps, which the indictment alleges were then and there, "at the time of so being stolen", the property of United States; that is to say, that said stamps were the property of the United States on the 7th day of June, 1896. It is not alleged that the stamps were the property of the United States on the 9th day of June, when it is charged the plaintiff in error received them at the city of Sioux Falls; this defect cannot be aided by any intendment or presumption arising as to the continuance of ownership after it has once been established, as has been decided over and over again. Such an allegation is insufficient, even in a civil action. In *Fredericks vs. Tracey*, *supra*, which was an action in replevin, commenced on the 19th day of November, the complaint alleged that the plaintiff was the owner and entitled to the possession of the property in controversy on the 17th day of November. In answer to the contention of the plaintiff that such complaint was sufficient, upon the theory that ownership once shown to exist is presumed to continue, the Court says:

"It is a cardinal principle in pleading that ultimate probative "facts are to be pleaded. The ultimate fact in such an action is "that the plaintiff was at the time the action was commenced the "owner of and entitled to the possession of the property. The fact "that he was the owner and entitled to the possession at a previous "date is *evidence* from which the ultimate fact may be deduced "upon the principle that a thing once shown to exist continues as "long as is usual with things of that nature. * * * There is "nothing in the complaint to show that at the time the action was "commenced the plaintiff had any ownership or right of possession "in said property, and for this reason the judgment is reversed."

The very early case of *Sir Nicholas Pointz*, *Cro. Jac.*, *214*, has been followed without question by all English-speaking courts, as to material averments.

That was a complaint for forcible entry, which described the land as "being the freehold of J. B." And it was held that the indictment was fatally defective, because "it was not alleged *ad tunc existens*, for it may be that the land was the freehold of J. B. at the time of finding the indictment and not at the time of entry." If that indictment was bad because the ownership of the land was only alleged to be in J. B. at the time of finding the indictment, then this indictment must be bad which fails to allege that the title to this property was in the United States at the time it was received by the plaintiff in error.

Such ownership must be stated and proven as alleged.

2 Bish. New Cr. Pro., §991a, and cases cited.

(d.). The indictment is also defective, in that it fails to allege from whom the plaintiff in error received the stamps which had been stolen. The indictment alleges the stamps to have been stolen at a remote point from Sioux Falls by certain persons on the 7th day of June, 1896, and that the defendant received the same stamps at Sioux Falls on the 9th day of June, 1896, but it does not allege that the plaintiff in error received them from the persons who were said to have originally stolen them.

U. S. vs. De Bare, 6 Bis., 358.
State vs. Ives, 13 Iredell, 338.
Foster vs. State, 106, Ind., 272.
2 Bish. New Cr. L., Sec. 1140.

For the same reasons that in ordinary larcenies and offenses against property it is necessary to allege the ownership, it is equally necessary in an indictment for receiving stolen goods to name the person from whom the receiver is said to have received them; he is entitled to know the nature of the accusation against him and to have such definite information given him in the indictment as to enable him to make a proper preparation of his defense, and to prevent being twice prosecuted for the same offense.

In *U. S. De Barre, supra*, which was a prosecution on the charge of receiving stolen postage stamps under the statute now in question, the learned trial Court says:

"I regard the point as conclusively settled upon authority. In "*State vs. Ives* it was held that an indictment for receiving stolen "goods must aver from whom the goods were received, so as to show "that the person charged received them from the principal felon. "If he received them from any other the statute does not apply."

In *Foster vs. State, supra*, the Court says:

"To render the offense of receiving stolen goods possible the "goods must retain their stolen character at the time the party "charged received them. If, therefore, the goods have been trans- "ferred from the thief to a guilty receiver, the latter takes as a re- "ceiver and not as a thief. In his hands, and as to him, the goods "are not stolen. In his hands the character of the goods is derived "from his offense, and not from the offense of the person who stole "them, so that one who receives goods from him, however wickedly, "is not guilty of receiving stolen goods, either within the common "law or statutory definition of the offense."

In *2 Bish., New Cr. L., Sec. 1140*, we find the law laid down in almost the same words used above in the Foster case.

(e.) The indictment is also fatally defective for duplicity; it contains complete indictments against the principal felons, and what is claimed to be an indictment against the plaintiff in error.

Rev. Stat. U. S., 1024.
1 Chit. Cr. Law, 267.
1 Bish. New Cr. Law, 429.

State vs. Lyon, 17 Wis, 237 (245).
State vs. Langley, 10 Ind., 482.
Elliott vs. State, 26 Ala., 80.
State vs. Daubet, 42 Mo., 242.
State vs. Hall, 97 N. Car., 474.
State vs. Wainwright, 6 Ark., 280.

But further than this the indictment nowhere alleges the property which the accused is charged with having received to have had any value whatever at the time of such receipt. It alleges that on the *7th* day of June certain thieves stole moneys and postage stamps of a given value, and on the *9th* day the accused received the postage stamps "so as aforesaid feloniously stolen", but nowhere are such articles alleged, at this latter date, to have any value or even to be the property of the United States or anyone else. The statute in question expressly makes it "a valuable thing". In such a case value must be alleged.

In conclusion, as to the insufficiency of this indictment, let us say that an indictment is never sufficient if all of the charges therein set forth may be true and still by any means consistent with the innocence of the defendant.

State vs. Godfry, 24 Me., 233.

In *State vs. Godfry, supra*, the Court, we think aptly, says:

"It is a well established principle that if all the facts alleged in "the indictment may be true and yet constitute no offense, the in-"dictment is insufficient."

May not each and every fact set forth in the indictment be true and still the accused not guilty. For the purpose of this argument we may concede, without admitting, that the property mentioned was stolen from the United States on the 7th day of June by the alleged thieves; that the accused received this same property on the 9th day of June; that he knew it had been theretofore stolen, and that he intended to convert it to his own use, and still be innocent. Can he not answer: all these may be true, but still I did not receive it of the thief; it was not the property of the United States at the time I got it; it did not have the character of stolen property at the time I received it; I got this property from parties to whom the United States conveyed it. Or he could answer: the United States recaptured this property and either itself or its grantee conveyed it to me; I knew that it had at one time been stolen, and I bought it for my own use, but I also knew that it no longer retained the character of stolen property.

IV.

The jury specially summoned to try the plaintiff in error upon this indictment the second term of the court was illegally ordered and improperly drawn:

(a.) Article VI of the Amendments to the Constitution pro-

vides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law." This provision of the Constitution has been frequently before the courts and has received the most liberal construction; it has been held that although the number of jurors to compose the panel is not specified, yet the constitutional provision means a common law jury of twelve men.

(b.) A common-law jury not only meant a jury of twelve persons only, but it meant a jury drawn from the vicinage; and the framers of the amendments to the Constitution were careful to provide that the jury must be drawn from among the inhabitants of the district where the crime shall have been committed, and also to provide that the district shall have previously been ascertained by law. Previously to what? Plainly, previously to the commission of the crime.

(c.) We have not to deal in this case with the question as to whether the law of Congress directing the presiding judge in certain cases to draw jurors from parts of the district to the exclusion of other parts; it is not necessary to discuss that broad question, but simply to discuss whether, for the reason given by this presiding judge, he had a right to exclude the vicinage, containing over 2,000 persons competent for jury duty (15), from the district from which he ordered the jurors drawn. The only reason given in this case for making this extraordinary order was that the plaintiff in error had once been tried at the same term of court; not a sufficient reason, surely, for overriding this salutary provision of the Constitution. It may well be doubted whether Congress has the power to authorize the presiding judge of a federal court to draw special jurors from a new district created after the alleged commission of the crime.

(d.) The district referred to in the Constitution means a jury district ascertained previously to the commission of the crime, and not necessarily the entire district over which a district court presides; the latter district may include any number of the former, but in all cases the jury district from which the trial jury "*liberos et legales homines de vincineto*", are returned must include the vicinage of the crime. It must be born in mind that one of the potent factors which led to the revolutionary war, and expressly resented in the Declaration of Independence, was the attempt of the Crown to deprive the inhabitants of the colonies of this important right—the right of a trial before a jury of their neighbors. In view of these facts, we think it will scarcely be contended that Congress, as early as 1789 passed the act in controversy with any other view than that the court might further limit the jury to the immediate neighborhood of the alleged crime. This is clearly the meaning intended by Section 802, R. S. U. S. It was the intent of Congress in the passage of this law that it would be executed in conformity with the con-

stitutional provision, and not in violation of it. It is of doubtful constitutionality at the best; certainly unconstitutional in the application which was made of it in this case.

Zanone vs. State, 97 Tenn., 101.
Smart vs. Kimball, 43 Mich., 448.
Olive vs. State, 11 Neb., 1.
State vs. Bunker, 38 Kan., 737.
People vs. Powell, 25 Pac. Rep., 481.
People vs. Hall, 48 Mich., 482.
Shafer vs. State, 1 How. (Miss.), 243.
State vs. Nash, 46 La. Ann., 194.
4 Blackstone Com., 350.
Cooley Con. Lim., 391.
Black's Con. Law, 572.

In *Zanone vs. State, supra*, the trial judge ordered a jury to be selected upon the second trial from the district exclusive of the city in which the crime was charged to have been committed, giving as his reason that in his opinion a proper jury could be more readily obtained. This the Supreme Court of Tennessee held to be an unconstitutional interference with the right of the accused.

In *People vs. Hall, supra*, the trial judge ordered a jury returned from the proper county, but excluded the township where the crime was charged to have bean committed. The Supreme Court of Michigan reversed the case, for the reason that the defendant was entitled to be tried by a constitutional jury of the vicinage.

The whole reason is concisely stated by Judge Cooley in his excellent work on Constitutional Limitations, *supra:*

"The jury must also be summoned from the vicinage where the "crime is supposed to have been committed, and the accused will "thus have the benefit of his own good character and standing with his neighbors, if these he has preserved."

We think this is well stated of the rights of the accused in the case at bar. Here is an attorney of good standing accused of an infamous crime. If he is a dangerous citizen, his neighbors will know it; while, if he has retained their respect, he is entitled to have the benefit of their good opinion. In place of this, under the meaning given the statute by the learned trial judge, his good standing is of no consideration. He is placed on trial before a jury of strangers, called by the officers of the prosecution to attend at an adjourned term held expressly for the purpose of trying him.

V.

The motion of the plaintiff in error that the action be abated by reason of the former trial, wherein the presiding judge, in the absence of the plaintiff in error and his counsel, and without their knowledge and consent, after the whole case had been submitted to the jury, and they had returned into court and announced that they

were unable to agree and were thereupon discharged from further consideration of the case, ought to have been allowed:

(a.) That the plaintiff was charged with an infamous crime is not an open question.

Re Wilson, 114 U. S., 417.
Re Claasen, 140 U. S., 200.

(b.) That it is necessary for the defendant to be present at all stages of the trial upon an infamous charge, is the established rule in this court.

Lewis vs. U. S., 146 U. S., 370.
Hopt vs. Utah, 110 U. S., 574.

(c.) In case it becomes neoessary in the course of the trial to discharge the jury before they have arrived at a verdict, the accused must be personally present, and if he is not, the discharge will be wrongful, and he cannot be again placed on trial for the same offense.

State vs. Wilson, 50 Ind., 487.
State vs. Schuchart, 18 Neb., 454.
State vs. Alman, 64 N. C., 364.
State vs. Sommors, 61 N. W. Rep., 907.
Redder vs. State, 17 S. W. Rep., 717.
People vs. Gage, 48 Cal. 323.
Clark's Cr. Law, 373-4.
11 Am. & Eng. Ency. L., 955.

When the action was called for trial the second time, the above facts appearing from the record, it became the duty of the Court to refuse to proceed further with the case.

9 Ency. Pl. and Pr., 635.
State vs. Cross, 29 S. E. Rep., 527.
Foster vs. State, 8 S. W. Rep., 664.
State vs. Martin, 30 Wis., 222.

VI.

The act of March 3, 1875, is unconstitutional. It is violative of Art. VI of the Amendments to the Constitution, because it attempts to do away with the salutary provision, that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him.

The gist of the offense created by this statute, so far as the receiver of property claimed to have been stolen is concerned, is that the property has been stolen; that is the principal ingredient of the offense. This law proposes that the courts shall accept as conclusive the conviction of the principal felon that the property was stolen by him, and this whether the conviction is secured upon a plea of guilty or upon a verdict of a jury. Were it not that there arises a presumption against a person who has in his possession property that has been stolen this provision of the statute would not be so

harmful, although it would be still objectionable to the constitutional provision; but the law, as interpreted by the Court below, does raise a presumption against the possessor of stolen property (which the presiding judge rigorously applied in this case), and the accused is therefore vitally interested in having those witnesses whose testimony is relied upon to give that character to the property produced and sworn, so that he can have an opportunity to cross-examine them. In this case there was no evidence of actual knowledge on the part of the accused that the property had been stolen; that was proven (if it can be so said) by the record of conviction of the principal felons, and the presiding judge thereupon held, and so charged the jury that a presumption (sufficient to make a *prima facie* case against the accused) sprang into existence and placed the accused upon an explanation. Manifestly, the constitutional right of the plaintiff in error has been most cruelly violated; first, in dispensing with the presence at the trial of the witnesses who possibly might have shown the property to have been stolen, and then by raising a presumption of guilt from the possession of the property, only shown by a certificate of conviction of other parties, to be property of that character.

This right to be confronted by the witnesses against him, conferred by Article VI of the Amendments to the Constitution, and demanded by the accused at the trial, is now raised for the first time in this Court. Most of the other subjects of that and the preceding article have been considered and fully discussed, notably the other provision against self-incrimination. From the discussions of the other cases, the extreme jealousy of this Court in regard to legislation intended to impair, however slightly, the assured rights of accused persons is very apparent.

In *Counselman vs. Hitchcock*, *142 U. S.*, *547*, the question before the Court was whether the immunity provided in Section 860 of the Revised Statutes was coextensive with the constitutional provision that no person should be compelled to be a witness against himself in a criminal case. That section declared substantially that no evidence obtained from a witness under the provisions of that section should be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture.

The Court held that this law was violative of the constitutional rights of the witness, for the reason, among others, that "it could not and would not prevent the use of the testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when, otherwise, if he had refused to answer, he could not possibly have been convicted."

To meet the objections of the Court, Congress passed the act of February 11, 1893, which was before this Court for consideration in the case of *Brown vs. Walker, 161 U. S., 591.* This act, which gave immunity to the witness from all future prosecution as to any matter growing out of that which he might testify about, was only sustained by a bare majority of this Court, and distinctly upon the ground that by no possibility, under the new law, could the witness be placed in a worse condition by reason of his testimony. He could not, in regard to such matters, be an "accused person", and therefore this act was upheld; but the argument of the opinion of the majority of the Court is an unanswerable argument against the constitutionality of the law of March, 1875.

Counselman was a self-confessed criminal. With that the Court had nothing to do. It was considered better for the administration of justice under the Constitution that ninety and nine Counselmans should go unpunished rather than that the effective power of a constitutional safeguard should be impaired, even in theory. We say "in theory", for in the history of this country, although statutes similar in provision to Section 860 have been, from the very earliest times a part of the jurisprudence of the United States and of several of the states, there is no recorded case where it was ever attempted to use testimony of a witness thus secured against that witness in a subsequent prosecution. The law had never done harm, although it was of common application and generally accepted as constitutional; but because it contained an element that might be harmful it was expunged ftom the statute books.

How much more important to the person is the safeguard which insures to the accused the right to be confronted with the witnesses against him. The history of the world is crimsoned with the blood of the victims of star chamber courts, and today the Republic of France is convulsed and its very foundations shaken by reason of the conviction of one of its army officers upon a trial where the culprit was not "confronted with the witnesses against him."

Trials in the absence of the accused, where the testimony of witnesses he does not meet face-to-face is received, like extorted confessions, have ever been joined in the animadversions of writers concerning the inhuman courts by which cruel princes have sought to sustain their thrones.

The enormity of the statute in permitting the character of the goods to be proven as stolen, by witnesses not called into the presence of the accused and the trial court, is apparent when it is considered that adverse presumptions are raised by the silent provisions of the law, from the possession of goods which have been proven to be "stolen".

So that under this statute a complete case is permitted to be made out that one has stolen goods in his possession, and also that the possession is a criminal possession, without the evidence of a single witness which the accused can examine. This law stamps the

goods as stolen, and the rules of law, as charged by the Court, raise a presumption of guilt.

Upon the trial of this action the only evidence of any crime having been committed at the Highmore postoffice, outside of the testimony of Mr. Fosness, the postal inspector who was allowed to testify over objection that he knew of it being robbed (70) through a telegram he received from some undisclosed source, is the record of the conviction (21 to 30) of these three parties, two of whom were sentenced on the plea of guilty and one on the verdict, as we shall show later, of an unconstitutional jury. Can it be legally contended that the mere fact that a party has, in the absence of the accused, said that he himself is guilty, is to be received as evidence sufficient to justify the conviction of the accused? We think not.

Commonwealth vs. Elisha, 3 Gray (Mass.), 460.
State vs. Henkle, 54 Pac. Rep. (Or.), 155.
State vs. Newport, 4 Harr (Del.) 567.
State vs. Arnold, 48 Ia., 566.
State vs. Weztfall, 49 Ia., 328.
Jeremiah Hill's case, 1 City Hall Rec., 66.
People vs. Kroker, 72 Cal., 459.
Reg. vs. Robinson, 4 F. & F., 43.
Reg. vs. Pratt, 4 F. & F., 315.
1 Green. Evidence, Sec. 233, and cases cited.
Wharton Cr. Ev., Sec. 699 (8th Ed.), and cases cited.

This constitutional provision, guaranteeing to the accused the right to be confronted by the witnesses against him, is self-operating in its nature. No law of Congress was necessary to give it effect. It was of itself a limitation upon the power of the Court, and while Congress could throw further protections around the accused, in the absence of such legislation the Court was in this respect limited only by the Constitution. No act of Congress was necessary to enable the Court to reach this limit. The act of March 3, 1875, would, were it of any validity, be cumulative only. It would confer no new authority upon the Court, which was then only limited by the Constitution in determining what was competent as evidence. If the conviction of the thief was admissible in evidence under the Constitution prior to this act, it is yet; otherwise not.

In *Wharton on Evidence, supra*, we find the following:

"His confession therefore, subsequently made, even by a plea "of guilty, is not admissible as evidence against any but himself."

In *Commonwealth vs. Elisha, supra*, the Court says:

"Was the record of the conviction of the thief legal evidence "against the defendant upon the charge of receiving? We think "not, either on principle or authority. That conviction was *res in-*"*ter alios*. The defendant was not a party to the proceedings and had "no opportunity or right to be heard on the trial."

As will be seen from the cases above cited, a conviction could not be based on the uncorroborated testimony of the thief, properly

given. How then can more weight be given to his *ex parte* statement?

But there is another reason why the record of conviction of the alleged thieves cannot be received, which is well illustrated in this case. The principal felons are accused of stealing from the Highmore postoffice a large amount of stamps of different denominations, treasury notes, bank notes, gold and silver certificates, gold and silver coins, the theft of any one of which would sustain the charge in their indictment, while in the case now before the Court the plaintiff in error is accused in the indictment only of the receipt of certain stamps. The Court then has, under the contention of the prosecution conclusively presumed that the alleged thieves stole *all* the property mentioned in the indictment against them. In other words, it may have developed upon the trial of the principal felons that they stole one silver coin of the value of ten cents, and nothing more. Upon this the jury were obliged to return a verdict of guilty, and now, upon the trial of the accused, the Court has held that the postage stamps, because mentioned in the same indictment with the silver coin were likewise stolen. To do this is to overturn every principle of law which has been the outgrowth of ages, and to place it in the power of the prosecution to have the accused in the first instance presumed guilty, and transfer to him the burden of proving himself innocent under pain of conviction. For instance, suppose a jewelry store is burglarized and a silver spoon stolen. An indictment is returned against a suspected party, charging him with the theft of the spoon and also of a gold watch, which perhaps the dealer had missed, forgetting he had sold it a short time previously. Upon the trial the theft of the spoon is established and the thief convicted; and on this record, if the trial court is correct in its rulings, the party who had purchased the watch of the jeweler may be indicted and convicted on the charge of receiving a stolen watch—although no such watch was stolen; all because the grand jury inadvertantly described his watch as a part of the stolen property.

As we have said, the record of the conviction of one of the thieves before a jury shows such conviction on its face to be illegal and void. By the act of Congress approved November 3, 1893, the District of South Dakota is divided into four subdivisions, or trial districts. Highmore, where they are accused of having committed the trial alleged, is in Hyde county, in the Central division, with court therefor held in Pierre. Section 6 of this same act provides for the impaneling of a grand and a petit jury in each subdivision from the residents thereof. For some reason not apparent to us these parties were indicted and tried at Deadwood before a jury from the Western division. That such a proceeding was clearly in disregard of the constitutional right of such defendant and wholly void seems to us clear, for reasons given in another part of this brief.

In *Boyd vs. The Unitsd States, 116 U. S., 616, 635,* Mr. Justice Bradley said:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal mode of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half of their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

We claim that this constitutional provision shall only be construed with that liberality, which all of the decisions of this court insist they are entitled to. The law of March, 1875, is a stealthy encroachment upon the rights of the citizen, and is more than a "slight deviation" from legal modes of procedure. In prosecutions against the receiver of stolen goods, as above pointed out, the fact that the goods are stolen is one of the principal ingredients of the offense, and by all the cases, was necessary to be alleged and proven, or a conviction could not follow. The obvious intention of the act of 1875, was to dispense with the necessity of this proof, to make convictions, right or wrong, easier to be secured.

VII.

If the record of the conviction of the principal felons be laid out of the case, there is then no evidence that the property was "stolen property," and the verdict must be set aside. There was no other evidence in the case that the property was of that character.

And there is no evidence whatever that the property was the property of the United States; the prosecuting attorney seems to have proceeded upon the theory, a theory which was sustained by the Court, that the record of conviction not only proved the property to have been stolen but also that it was the property of the United States; the statute of the 3rd of March, 1875, does not provide that the record of conviction shall be conclusive proof of the ownership of the property, it only goes to the extent of being conclusive proof that the property has been stolen.

State vs. Careneas, 78 N. C., 484-491.
2 Bish. Cr. L. 1138.

VIII.

Besides admitting the record of conviction of the principal felons, the Court also permitted several improper questions to be asked and answered; notably those in relation to the identity of the persons who were seen in the vicinity of the alleged robberies con-

necting the plaintiff in error with either the felons or the express package; permitting the witness Fosness to swear to the fact of the robbery at Highmore (70), when his only knowledge was that received from a telegram the following day; permitting that witness to testify to other robberies than those mentioned in the first count of the indictment (74), and particularly as to those claimed robberies at Miller and Waubay, of which the plaintiff had been acquitted of having any complicity.

IX.

There is absolutely no evidence of any sort that the plaintiff in error had the stamps in his possession with intent to convert them to his own use and gain. For that reason if for no other the Court should have allowed the motion directing the jury to have returned a verdict of not guilty. Search this record from one end to the other, and there is not a scintilla of evidence, (except the presumption which the trial court held the law raises from the possession of stolen goods) that the plaintiff in errer knew that they had been stolen. It is to be remembered that the plaintiff in error is a practicing lawyer, in his professional capacity it was his duty to attend to the interests of his clients; it is not to his discredit that thieves and other criminals are among his clients; such criminals have rights which the courts and lawyers are bound to respect; such a lawyer might be in the possession of stolen goods without any adverse presumption being raised against him; after the Postoffice Inspector Fosness had received these stamps, of course no presumption would be raised against him, and yet in his receipt of them, he states that he takes them into his possession "believing them to have been stolen." The possession of stolen stamps by a regular practitioner in the court ought not to be considered as a presumption against him, unless long continued and coupled with some other incriminating circumstances.

Durant vs. People, 13 Mich., 351.
State vs. Bulla, 89 Mo., 595.
2 Bish. New Cr. Law, § 1138 to 1140.
State vs. Caveness, 78 N. C., 484-491.
20 Am. Eng. Ency. Law, 442.
Wilson vs. State, 12 Tex. App. 481.

Therefore, we see, that something more than the mere possession of stolen property is required in order to sustain a conviction; that possession, in the language of the indictment and the statutes must be with the intent to convert the property to his personal use and gain; and as to this branch of the case, there is no evidence whatever of there having been any such intention on the part of the plaintiff in error; his entire conduct with the postoffice inspector and the assistant district attorney was that of one having innocently in his possession property which those persons claimed had been

stolen. Not one of the stamps had been used by him; they were in the original package; he surrendered them just as soon as he had ascertained that there was a possibility that the claim made was true; he did all that the most scrupulous official could demand.

In *Durant vs. People supra.*, the Court says: "Possession itself "without evidence tending to show such guilty knowledge could "have no tendency to establish her guilt."

In *Wilson vs. State* the Court said: "Before the defendant can "be properly convicted it must be proven beyond a reasonable doubt "first that the property was acquired by theft, second that knowing "it to have been so acquired he concealed it."

In *State vs. Caveness, supra.*, the Court said: "To be guilty "the defendant must have known at the moment of receiving it that "it had been stolen and must at that time have received it with fel- "onious intent."

The plaintiff in error was entitled to have the judge charge in his first request (90) to the effect that as no issue had been taken by the prosecution upon the plea of former jeopardy (16-17) it was their duty thereunder to return a verdict in his favor upon such plea.

9 Ency. Pl. and Pr., title Former Acquittal 638 and cases cited.

For the reasons already shown in the authorities cited we think he should also have charged the jury as stated in the third request (91) of the plaintiff in error to the effect that recent unexplained possession by the defendant of stolen property was no evidence from which they could under the charge infer a guilty receiving on his part, and that the burden of showing such knowledge was on the prosecution.

For like reasons the Court should have given the fourth request (91) to the effect that there was no evidence that any of the alleged thieves sent the stolen property to the defendant, as there was no evidence to identify E. Baxter mentioned in the testimony of witness Howe (62) with the convict Ed. Baxter, and that the testimony of Mr. French (41) shows that another party by the name of Baxter was at Gettysburg at this time.

Andrews vs. Wynn, 4 S. Dak., 40.

In this case the Court said: "The Court can not take judicial "notice that Edward H. Andrews and E. H. Andrews are one and "the same person. We are of the opinion that it is not and we "could no more hold that E. H. meant Edward H. than we could "say Elmer H. meant Edward H."

XI.

The charge of the Court was misleading and erroneous, particularly (93) that part, as follows:

"Now, in the absence of any evidence to the contrary, that "record is sufficient proof in this case upon which you would be

"authorized to find that the property alleged in the indictment, was "stolen as alleged; in other words, it makes a *prima facie* case on "the part of the government which must stand as sufficient proof of "the fact until some evidence is introduced showing the contrary, "and there being no such evidence in this case, you will no doubt "have no trouble in coming to a conclusion that the property de- "scribed in the indictment was actually stolen, as alleged, from the "postoffice in Highmore."

State vs. Bulla, supra.
Durant vs. People, supra.

XII.

The presiding judge unwarrantably interfered with the verdict of the jury (97). To better comprehend the effect of this we ask the Court to in this respect consider the affidavits of the respective jurors. Under the evidence in the case the jury in their own way arrived at the conclusion that the defendant had in his posession stolen property but not for an improper purpose, and so expressed it in their first verdict.

1 Bish. New Cr. Law, Sec. 1006a.

It must be born in mind that the jury is composed of lay people not versed in the technicality of the law. There was nothing in the circumstances which could justify the judge in suggesting to the jury a verdict finding facts against the defendant different from the one upon which they had agreed, The effect of such suggestion when considered in connection with the charges of the Court combined with the fact that no copy of the indictment was given the jury is quite plain. It will be noticed that nowhere in the whole course of the procedure was the word "count" used in the presence of the jury until at this time. We think the jury were clearly misled by such procedure.

XIII.

The Court erred in refusing to consider the affidavits of the jurors (19).

2 Thompson on Trials, 2619 and cases cited.
Dalyrimple vs. Williams, 63 N. Y. 361.
Sawyer vs. ——, 5 Cow., 106.

XIV.

The tribunal before which the plaintiff in error was convicted was *coram non judice.* The act of Congress approved November 3, 1893, entitled "An Act to Provide for the Time and Place of Holding the Terms of the United States Circuit and District Courts in the State of South Dakota", divides the state into four subdivisions, and designated times and places within each of the subdivisions

where court shall be held. It provides that the term for the Southern division shall be held at Sioux Falls on the first Tuesday in April, and for the Northern division, at Aberdeen on the first Tuesday in May. After the first trial of the plaintiff in error upon the indictment in this case the Court then attempted to adjourn the term at Sioux Falls over the Aberdeen term until June, and at this latter time proceeded to try the case.

Van Fleet Collateral Attack, Sec. 32, and cases cited.
State vs. Roberts, 9 Nev. 44.
Wicks vs. Ludwig, 9 Cal., 173.
Norwood vs. Kenfield, 34 Cal., 329.

A. G. SAFFORD AND
C. O. BAILEY OF COUNSEL
AND JOE KIRBY, *Pro. Per.*

DARK PAGE BLEED THRU

No. 164.

Supp. Br. of Safford for P. E.

Filed Jan. 23, 1899.

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Clerk.

In the Supreme Court of the United States.

October Term, 1898.

JOSEPH KIRBY,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 164.

Supplemental Brief for Plaintiff in Error.

A. G. SAFFORD,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

October Term, 1898.

JOSEPH KIRBY,
Plaintiff in Error,
vs.
THE UNITED STATES.
No. 164.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

It was admitted on behalf of the defendant, upon oral argument, that the jurisdiction of this court to review the proceedings of the district court of South Dakota could not be questioned.

It was also admitted that if the plaintiff in error succeeded in establishing any one of the four constitutional questions involved, this court should set aside the verdict.

Those questions are:

1. Whether the indictment is fatally defective.

2. Whether the plaintiff in error was once placed in jeopardy by reason of the discharge of the jury at his first trial, when he was not present in court.

3. Whether the jury empanelled at his second trial

which resulted in his conviction, was a constitutional jury.

4. Whether the act of March 3, 1875, is a constitutional statute.

It is submitted, however, that there are very serious and important questions for the consideration of this court other than these exclusively constitutional questions, and of which, under the authority of Horner *vs.* U. S., 143 U. S., 570, the court has jurisdiction because they constitute parts of the whole case, having those other elements which confer jurisdiction.

I.

Taking up the purely constitutional questions :

FIRST. If it be necessary to allege and prove all of the ingredients of which a crime is composed (and this is not seriously questioned), the indictment did not inform the accused of the nature of the offence of which he was convicted ; if it be necessary to allege the fact that the stamps were stolen property *at the time of their being received* by the plaintiff in error, or that they were the property of the United States *at that time*, or to allege from whom said stamps were received by him, the indictment is bad, and if the court finds that the indictment fails in any one of these three particulars, the plaintiff in error must prevail.

In reply to the suggestion that the second section of the act of March 3, 1875, describes several distinct offences, (*a*) receiving, (*b*) concealing, (*c*) aiding in concealing, (*d*) having, (*e*) retaining in his possession with intent to convert, stolen United States property, then this indictment which charges the plaintiff in error with "receiving" and "having," is bad for duplicity, it does not inform him of the nature of the accusation against him ; if these are independent crimes, he cannot

be charged with both offences in the same count. I submit, however, the words "concealing" and "retaining" being left out of the indictment, that the charge is simply that of being a receiver.

It is either a simple charge of receiving, which involves the necessity of an allegation as to the person from whom the property was received, or it is a compound allegation, and for that reason, offensive for duplicity.

SECOND. The only answers to the claim of former jeopardy, are (*a*) that the same was not presented by a *plea*, and (*b*) that the offence under the second section of the act of March 3, 1875, is a misdemeanor only. By turning to the record, it will be seen (p. 17) that the plaintiff's objection was not only substantially but formally in the nature of a *plea*; it is taken *verbatim* from the established precedents; after reciting the claims and acts in all the explicit verbiage of the common law, it concludes with a verification, as follows, "contrary to the form and effect of the statute, in such cases made and provided, *all of which this defendant is ready to verify.*"

Baysinger *vs.* State, 77 Ala., 60;
State *vs.* Welch, 79 Maine, 99;
Johnson *vs.* State, 29 Ark., 31.

Besides, it appears from the record (p. 9) that the court passed upon the question in the form it was raised, *without objection on the part of the prosecuting attorney.* Had the prosecuting attorney objected, upon the ground that the plea was not sufficiently formal, or out of time, certainly in a case pregnant with so much of importance to the plaintiff in error, the court would have permitted an amendment of the pleading.

Rex *vs.* Chamberlain, 6 C. & P., 93.

There being no objection, all questions as to strict

formality were waived, even if they existed; the court read, however, into the plea, the record of the court proceedings for the term and treating those records as a part of the pleading, overruled the plea, as if it had been demurred to, and this was one of the substantial exceptions of the plaintiff in error to the conduct of the trial (p. 100), and argued in the original brief at page 16.

To the objection that the offence (or offences) created by the second section of the act of March 3, 1875, being only a misdemeanor, I contend that such a holding would lead to a most absurd conclusion.

The tendency of the decisions of this court is to do away with the meaningless fictions of the common law; this court looks, particularly in criminal cases, to the substance rather than to the shadow; the reasons underlying the distinction in ancient times between felonies and misdemeanors, have long since lost their vitality, and have been trampled into the mud of history by the irresistible armies of civilization; the rule has gone, the reason for it no longer existing. That crimes have two rational divisions, founded upon reason and common sense, cannot be gainsaid, *i. e.*, those that are infamous and those that are not infamous; the amendment of the circuit court of appeals act, makes a subdivision of the class of infamous crimes appropriate, into (*a*) those capital and (*b*) those not capital, because capital cases can be brought to this court without involving the consideration of any federal statute or the constitution; having these divisions, capital, infamous, and non-infamous, there exists no substantial reason for others. This court has held that a statute imposing so severe a penalty as does this second section of the act of March 3, 1875 (and the court will note that the punishment is precisely the same in the first and

second sections of the law), is an infamous crime, and there is no reason why there should be one rule for one infamous crime, and another rule for another; the rights of persons under one infamous crime should be held to be the same for all infamous crimes; there is a reason for different rules for trials for the commission of crimes non-infamous; the old-time distinction formerly existing between felonies and misdemeanors may well be preserved as existing between infamous and non-infamous crimes, but any extending of the domain of misdemeanors over into the territory of infamous crimes amounts to the perpetuation of a senseless fiction of the law, particularly is this so in the courts of the United States where there are no common law distinctions of felonies and misdemeanors, although Congress, in its wisdom, sometimes creates an offence and says that it "shall be deemed a felony" or "a misdemeanor," as the case may be. There is no unvarying rule about this and all ought to be measured by their punishments.

THIRD. In regard to the challenge to the array of jurors, for the reason that the city of Sioux Falls was excluded from the territory from which the panel was drawn, it was contended before the court by the learned attorney for the defendant, that the constitutional requirement was complied with if the jury were drawn from anywhere in the district, no matter whether the vicinage of the crime was included or not.

This question, as shown in the original brief, pp. 18 *et seq.*, has been many times before the State courts and discussed by Judge Cooley, and other writers upon constitutional subjects; it is useless to enlarge upon the unanswerable reasonings of those cases and writers; it seems to be well settled that while the accused has not an inalienable right to have the jury drawn from

the whole body of the predetermined district, the territory from which the jury is drawn must in part comprise that of the vicinage of the crime.

But I insist, even if the court should not be convinced by the reasoning of the eminent judges in the cases cited, or by that of the writers of the elementary books, that in view of the constitutional phraseology, a judge at *nisi prius*, in a criminal case, has not an unreviewable discretion in that regard; if jury districts, under the provision of section 802, R. S., are to be changed upon the mere discretion of a judge, the greatest abuses might creep in; such a course in the administration of justice ought not to be permitted except upon judicial inquiry and rendition of a reviewable judgment; if it be simply a matter of discretion, unreviewable and final, and a judge can direct a jury to be drawn from the territory of a district excluding one important locality, he would have an equal right to direct the entire jury to be drawn from a single unimportant locality, and the only remedy would be in the Senate of the United States by impeachment, not a satisfactory solution of the question to one who by that injustice may stand convicted of an infamous crime.

FOURTH. The learned attorney for the defendant, admitted, as I understood him, that he was not prepared to defend the second section of the act of March 3, 1875, as a constitutional measure; he sought to avoid the effect of this admission by claiming that the presiding judge in his charge to the jury (p. 93) told them that the effect of the record evidence of the principal felon only made out a *prima facie* case; the attorney ignored the fact that appears (p. 21), that the presiding judge held that the record of conviction of the principal felons was conclusive. If the presiding judge had

changed his opinion as to the conclusiveness of the record prior to the making of the charge to the jury above alluded to, the record does not show it, and waiting until that time was "locking the stable after the horse was stolen."

Such reasoning is faulty for another cause, one accused of crime cannot be expected to have at his elbow during his trial evidence which the law says it will not receive; testimony has to be searched after and found and summoned before the trial begins, and it is monstrous to say that a judge could charge the harm out of this statute, by modifying and reversing the meaning of the words "conclusive," when that very word gave the plaintiff in error notice that it would be perfectly useless for him to introduce evidence in regard to an essential ingredient of his alleged crime.

But there is a graver and more important objection to this statute.

It is an unconstitutional and unwarrantable interference of the legislative with the judicial department of the government.

The legislature may properly prescribe the method of proof, such as, that seals of courts, corporations, commissions, etc., shall be judiciously noticed, but further than that they cannot go without encroaching upon the prerogative of the judiciary; they cannot say what shall be considered as proved, and this is so without regard to any constitutional question, but when a legislature attempts in criminal cases to enact that a certificate shall be "conclusive," it violates the prerogative of the judiciary, sets at naught the constitution and offends good sense.

It is matter of congratulation that notwithstanding the zeal of counsel, there is not to be found among the

distinguished corps of lawyers in the Attorney General's office, as now constituted, a single person who is willing "to do reverence" to this offensive statute, but it is a matter of "astonishment and concern" that any one can seriously advise this court that this offensive section should be permitted to remain upon the statute books in the vague and uncertain hope that in its administration, the *nisi prius* judges will rob it of its offensiveness, by saying that "*conclusive*" means *prima facie*.

> *But Titus said, with his uncommon sense,
> When th' exclusion bill was in suspense:
> "I hear a lion in the lobby roar;
> Say, Mr. Speaker, shall we shut the door
> And keep him there, or shall we let him in
> To try if we can turn him out again?"

The Standard definition of "conclude" (derived from *cum, claudo*—"to shut together") is "to bring to a completion; terminate; finish; as, to conclude an argument; to stop or restrain; in law, to estop; held bound by; usually in the passive; as, the plaintiff is concluded by his admission." The definition of "conclusive" is given as "decisive of the matter in issue; putting an end to doubt; sufficient to convince or decide; as, conclusive testimony."

While it is true that differing sections of the same law may not all be constitutional, and the unobjectionable sections stand while the objectionable ones are expunged, it cannot be that a section creating a crime theretofore unknown to the law, shall be considered unconstitutional and objectionable and constitutional and proper at the same time.

Outside of the domain of jugglery, bitter and sweet waters are not taken from the same source; and it

*Paraphrase by Bramston, of speech of Col. Titus, in the English Parliament, 1681.

would seem that if this court adheres to the doctrine, as announced by Mr. Justice Bradley and quoted in the original brief at page 21, this statute will disappear from our criminal jurisprudence, as section 860, R. S., and others, have disappeared, none of which, in my humble opinion, contained such a dangerous invasion of personal rights, as does the second section of the statute of March 3, 1875.

II.

But I consider, as being personally far more important to the plaintiff in error than any of the constitutional questions involved, the fact that I insist fully appears from the record that the plaintiff in error was not shown to have had any guilty knowledge whatever as to the property having been stolen from the United States.

No one testifies that the plaintiff in error himself received the stamps from the express man; the agent who delivered the package took a receipt bearing the name of the plaintiff in error and no one identified his signature, although inquiry was made, it goes without saying that if it had been the signature of the plaintiff in error, it would have been shown to be such; he was a practising lawyer and had resided in the city of Sioux Falls for several years, just how many the record does not disclose, but certainly long enough so that his signature could have been identified by witnesses, for several months intervened between the time when Fosness is shown to have had the receipt and the first trial, and there were nearly two months between the time of the trial in April, when the jury disagreed, and the trial in June, when he was convicted.

And in all confidence I assert that there is not in the testimony of Fosness and Van Buskirk (for none of the

other witnesses, except the express men at Sioux Falls, even knew the plaintiff in error) anything that would import guilty knowledge, nor was his conduct suggestive of such guilty knowledge, but was exactly that of an innocent person, and I am very glad to be able to make a sincere appeal to the court to set aside the verdict on this ground; the other grounds show the conviction to have been in violation of sacred personal rights; this ground shows it to have been unjust and a perversion of the right.

The plaintiff in error after having been once in jeopardy, appears to have been arraigned upon an indictment faulty and defective, based upon an unconstitutional statute before an improperly drawn jury, upon evidence perfectly consistent with his innocence, some of which was improperly admitted, deprived of other evidence improperly excluded, under a charge of the presiding judge, faulty as to what it contained and faulty in what it did not contain, convicted and sentenced upon a verdict which did not express the finding of the jury. Was there ever before such a tragedy of errors?

Respectfully submitted.

A. G. SAFFORD,

For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

JOE KIRBY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 164.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

In this case the indictment was found by the grand jury at October term, 1896, of the United States district court for the district of South Dakota, and was tried at a term of said court held in the month of June, 1897. A verdict was rendered by the jury as follows (Rec., p. 11):

> We, the jury, in the case of the United States against Joseph Kirby, find the defendant guilty as charged in the first count of the indictment.

The first count in the indictment reads as follows (Rec., p. 3):

> At a stated term of the district court of the United States of America for the southern division of the district of South Dakota, begun and held at the city of Sioux Falls, within and for the district and circuit aforesaid, on the third Tuesday of October, in the year of our Lord one thousand eight hundred and ninety-six.
>
> The grand jurors of the United States of America, good and lawful men summoned from the body of the southern division of the district aforesaid to intelligently inquire and true presentment make for said district of South Dakota, in the name and by the authority of the United States of America, upon their oaths do present that Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, late of the county of Brown, in said district, heretofore, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms at Highmore, in the district aforesaid and within the exclusive jurisdiction of this court, feloniously did forcibly break into a post-office of the said United States at Highmore, in said district, and did then and there feloniously steal, take, and carry away from and out of said post-office of the said United States at Highmore aforesaid three thousand seven hundred and fifty postage stamps of the said United States of the denomination of two cents and of the value of two cents each, one thousand two hundred and sixty-six postage stamps of the said United States of the denomination of one cent and of the value of one cent each, one hundred and forty postage stamps of the said United States of the denomination of four cents and of the value

of four cents each, two hundred and fifty postage stamps of the said United States of the denomination of five cents and of the value of five cents each, eighty postage stamps of the said United States of the denomination of eight cents and of the value of eight cents each, and United States Treasury notes, national-bank notes, silver certificates, gold certificates, silver, nick*le*, and copper coins of the said United States and current money of the said United States, a more particular description of which the grand jurors are unable to ascertain, of the value of fifty-eight dollars and nineteen cents, all of which said postage stamps, United States Treasury notes, national-bank notes, silver certificates, gold certificates, silver and nick*le* and copper coins, current money of the United States, so as aforesaid feloniously stolen, taken, and carried away from and out of the said post-office at Highmore aforesaid, was then and there at the time of so being stolen, taken, and carried away the property of the said United States, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid upon their oaths aforesaid do further present that the said Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King were and each of them was duly indicted and convicted of the offense aforesaid at the September term of the said court, held at Deadwood, in said district, in the year of our Lord one thousand eight hundred and ninety-six, and they and each of them were duly sentenced at said September term of said court upon such conviction.

And the grand jurors aforesaid upon their oaths aforesaid do further present that one Joe Kirby,

late of the city of Sioux Falls, in the district aforesaid and within the exclusive jurisdiction of this court, on the ninth day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at the city of Sioux Falls aforesaid, in the district aforesaid, the postage stamps aforesaid so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, contrary to the form, force, and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States of America.

Upon this verdict the court sentenced Kirby to imprisonment at hard labor for two years.

The indictment is drawn under the second section of the following act, which was passed March 3, 1875 (1 Supp. R. S., ch. 144, p. 88):

CHAP. 144. An act to punish certain larcenies and the receivers of stolen goods.

Be it enacted, &c., That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offense may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the peni-

tentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.

SEC. 2. That if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain any money, property, record, voucher, or valuable thing whatever of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen, or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted;

And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined.

Frank Parley, alias Thomas J. Wallace; Tom Whalen, alias Ed. Baxter, alias John P. Carroll, and Frank King, who are alleged, in the first count of the bill of indictment against Kirby, to have broken into the post-office at Highmore and to have stolen the stamps which Kirby is charged with having received and with having in possession, were convicted at a term of the United States dis-

trict court of the district of South Dakota, held at Deadwood in September, 1896. (See Record, beginning on p. 21.)

The indictment against these persons (Rec., p. 22) shows that they were charged with having broken into the United States post-office at Highmore, in the said district, and with stealing therefrom certain moneys, postage stamps, goods, and chattels of the United States.

The stamps which Parley and others were convicted of stealing were the stamps which the indictment against Kirby charged him with receiving, etc.

ARGUMENT.

In the course of the trial the plaintiff in error noted exceptions which were allowed by the court to the number of thirty-three. There appears to be some confusion as to the matter excepted to in some instances, but I think, in substance, the exceptions are as follows, and I state them seriatim for the convenience of the court:

The first exception (Rec., p. 20) is based upon the ground that the count in the indictment (first count) upon which Kirby was arraigned and placed on trial did not state facts sufficient to constitute a crime of which the court had jurisdiction or otherwise, and that the said count did not inform Kirby of the nature and cause of the accusation against him, as required by Article VI of the Amendments to the Constitution of the United States; and that to proceed to trial upon said count would be to deprive Kirby of his liberty or property without due process of law, as provided by Article V of the Amendments to the Constitution of the United States.

The second exception (Rec., p. 20) is based substantially upon the same grounds, and, in addition thereto, in paragraph 4 of the objections (Rec., p. 21) it is insisted that section 2 of the act of Congress approved March 3, 1875, is unconstitutional and not according to due process of law or the laws of the land, and especially in so far as the same attempts to make the judgment of conviction of the principal felon conclusive evidence in the prosecution against the receiver that the property therein described has been embezzled, stolen, or purloined.

The third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth exceptions are all based upon objections severally made to the introduction as evidence of the several parts of the record of the trial of Parley and others. (See record, beginning at third exception on p. 21 to p. 29, inclusive.)

The thirteenth exception is based upon objection to the testimony of B. M. Lister (Rec., p. 30), who was called as a witness to identify Parley and others as the parties named in the bill of indictment. (This witness also stated facts which tended to show that Parley and others named in the indictment robbed the post-office at Highmore.)

The fourteenth exception (Rec., p. 33) is based on an objection to the testimony of Lister, in which the witness, after he had testified that he was not sure as to Baxter, was allowed to state that in his judgment he was the man.

The fifteenth exception (Rec., p. 44) is based upon an objection to the admission of the hotel register at the Clark House, Gettysburg, S. Dak., which shows that

Carroll, Wallace, King, and Baxter registered there on Saturday, June 6, 1896, the objection being overruled, the testimony admitted as Exhibit L, and an exception taken and allowed.

The sixteenth exception (Rec., pp. 59–61) is based upon an objection to the introduction of a freight waybill of the American Express Company, No. 97, June 9, 1896, from Gettysburg, S. Dak., showing that one package was received at Gettysburg on that day, addressed to Mr. Joe Kirby, weighing 2½ pounds, with charges, 35 cents, prepaid; and to introduction of record of waybills forwarded from Gettysburg June 9, 1896, showing package received from E. Baxter, addressed to Mr. Joe Kirby, Sioux Falls, S. Dak., weighing 2½ pounds, prepaid charges 35 cents, which waybills were identified by witness, who was an employee of the company. The objection was overruled and exception noted and allowed.

The seventeenth exception is based upon objection to a certain portion of the testimony of witness Howe as incompetent, irrelevant, and immaterial. (Rec., p. 63).

The eighteenth exception is based upon objection to the introduction of waybill of American Express Company described in record, page 64, which tended to show that, on June 10, 1896, Mr. Joe Kirby received the package weighing 2½ pounds shipped the day before to him from Gettysburg, S. Dak.

The nineteenth exception is based upon an objection to the introduction of the testimony of witness Tyler (Rec., p. 65) as to the entries in the record of the express company, Tyler being an employee, which record tended to show the shipment of the package in question and its

receipt by Kirby. Objection overruled, exception noted and allowed.

The twentieth exception (Rec., p. 65) is based upon an objection to the testimony of witness Tyler relative to the shipment of the package in question; and

The twenty-first exception (Rec., p. 66) is based upon substantially the same grounds; as also

The twenty-second exception (Rec., p. 66).

The twenty-third exception is based upon an objection to the testimony of Nicoli (Rec., pp. 67–68), who was the driver for the American Express Company, and whose business it was to deliver packages which had been shipped by the company. This evidence tended to trace the package in question into the hands of Kirby.

The twenty-fourth exception (Rec., p. 68) is based also upon objection to the testimony of witness Nicoli, and to the testimony of witness Fosness (Rec., p. 69). The testimony of Nicoli, as before stated, was to the effect that he had delivered the express package at the office of Mr. Kirby, in Sioux Falls. This witness stated that his recollection of the delivery of the package at Kirby's office was based upon the fact that the delivery book of the company bore a check mark of the delivery of the package which witness himself had made. The testimony of the next witness (Fosness), which also tended to prove that the package was received by Kirby, related principally to a conversation witness had with Kirby, which resulted in the procurement by the witness from Kirby of the package, which, when opened, contained 1,266 one-cent stamps, 5,050 two-cent stamps, 140 four-cent stamps,

and 150 five-cent stamps, of the total value of $126.76. (See record, pp. 70–73.)

The twenty-fifth exception (Rec., p. 74) is based upon an objection to the testimony of witness Fosness relative to a conversation with Kirby in regard to other packages which were claimed to have been sent to Kirby after the robberies at Miller and Waubay. It will be observed that in the second and third counts of the indictment against Kirby he was charged with having received articles of property belonging to the United States which had been stolen from the post-offices at Miller and Waubay. In his conversation with Fossness he admitted having received certain packages, but that he had not opened them. (See testimony, bottom p. 74 of Rec.)

The twenty-sixth exception (Rec., p. 85) is also based upon exception noted in the examination of Fosness, who was a post-office inspector. This witness, upon cross-examination, was being questioned in regard to instructions to him from the Department. He was asked by counsel for Kirby if he had not received instructions from the Department to demand payment of these losses from Kirby, to which he answered, "No, sir; I didn't." In the further cross-examination he was asked, "Suppose he [Kirby] had paid that, would you have prosecuted him?" and then the question, "Did you have any instructions from the Department in regard to that?" Counsel for the prosecution objected, which was sustained by the court, to which defendant excepted, and exception was allowed. (Rec., p. 85.)

The twenty-seventh exception (Rec., p. 86) is based upon an objection to the testimony of Van Buskirk, witness for the prosecution. Van Buskirk was assistant district attorney, and was called upon to testify as to a conversation in the office of the district attorney on the 2d of July, 1896. The objection was to the testimony of this witness, because he said, in effect, that he recollected the conversation but could not give the exact language, but could give the substance. To this defendant objected. Objection overruled and exception allowed.

The twenty-eighth exception (Rec., p. 86) is based also upon the further testimony of witness Van Buskirk as to the conversation between Mr. Kirby, Mr. Fosness, and Mr. Miller in the district attorney's office. (See testimony beginning under twenty-eighth exception, on p. 86 of the record and extending on p. 87).

On page 89 of the record will be found further exceptions which were allowed. The first, beginning at the top of the page, and not numbered, is based upon a motion by the counsel for Kirby to strike out the testimony of the witness Howe, for reasons stated in the motion; and following is an exception numbered "28," in which counsel moved to strike out all the testimony of the witness Tyler in reference to the receipt at the Sioux Falls office of the express company of a package addressed to Kirby, for reasons stated in the motion; and on the same page an exception numbered "29," in which the counsel moves to strike out all the evidence of the witness Nicoli, for the reasons stated. (There is another exception numbered "28" heretofore.)

The thirtieth exception (Rec., p. 89), the thirty-first and thirty-second (Rec., p. 90), and thirty-third (Rec., p. 91) are based upon the refusal of the court to give special instructions to the jury as requested by counsel for Kirby.

Upon the several exceptions thus stated, taken and allowed during the trial, the counsel for plaintiff in error has made assignments of error to the number of twenty-three (Rec., pp. 100–107), in which the several points suggested by the exceptions are presented, except there appears to be no error assigned as to the application of the Constitution of the United States, and errors assigned in the latter part of assignment 21, and in assignments 22 and 23, are not, so far as I can see, grounded on any exceptions taken and allowed.

The first question for the consideration of the court is as to whether this is a case (it not being a conviction for a capital crime) which can come to the Supreme Court by writ of error directly from the district court, in which the trial was had.

It is insisted by the plaintiff in error that the construction—or, rather, the application—of the Constitution of the United States is involved, and that the constitutionality of a law of the United States is drawn in question.

Although, as stated above, there is no assignment of error based upon the first exception, and so much of the second as relates to the application of a provision of the Constitution of the United States, yet assuming that, notwithstanding this, the court will consider the point, I submit that the position taken by plaintiff in error can not be successfully maintained.

It is contended that the indictment in this case is insufficient, in that it does not charge a criminal offense, and that this involves the application of that part of Article VI of the amendments to the Constitution of the United States which provides that in all criminal prosecutions "the accused shall be informed of the *nature* and *cause* of the accusation." In other words, an indictment which does not contain the allegations, specifications, and technical terms which are necessary to fulfill all of the requirements of the law relative to the sufficiency of indictments is offensive to the provision of the Constitution above quoted.

I present to the court but one view upon this first point, and that is that the indictment is sufficient.

I admit that the offense of which the plaintiff in error is charged is an infamous crime, because the statute creating the offense empowers the court to imprison at hard labor. I also concede that the offense charged is such that the plaintiff in error can not be held to answer except upon the indictment of a grand jury.

With these propositions admitted, as stated before, there is but one question remaining for the consideration of the court, and that is as to whether or not this indictment sufficiently charges the alleged offense.

Let us analyze the count upon which the plaintiff in error was tried, and we find it alleged that Parley, Whalen, and King, on the 7th day of June, 1896, feloniously and forcibly broke into a post-office of the United States at Highmore, in the said district, and did then and there feloniously steal, take, and carry away from and out of said post-office 3,750 postage stamps of the said United

States of the denomination of 2 cents and of the value of 2 cents each, 1,266 postage stamps of the said United States of the denomination of 1 cent and of the value of 1 cent each, 140 postage stamps of the said United States of the denomination of 4 cents and of the value of 4 cents each, 250 postage stamps of the said United States of the denomination of 5 cents and of the value of 5 cents each, 80 postage stamps of the said United States of the denomination of 8 cents and of the value of 8 cents each, * * * all of which said postage stamps * * * so as aforesaid feloniously stolen, taken, and carried away from and out of the said post-office at Highmore aforesaid, were then and there at the time of so being stolen, taken, and carried away *the property of the said United States.*

The indictment then alleges that Parley, Whalen, and King were duly indicted and convicted of the offense aforesaid at September term of the said court, held at Deadwood, in the said district, in the year 1896, etc.; and then it alleges (Rec., p. 4)—

> That one Joe Kirby, late of the city of Sioux Falls, in the district aforesaid and within the exclusive jurisdiction of this court, on the ninth day of June, in the year of our Lord one thousand eight hundred and ninety-six, with force and arms, at the city of Sioux Falls aforesaid, in the district aforesaid, *the postage stamps aforesaid so as aforesaid feloniously stolen, taken, and carried away* feloniously did receive and have in his possession, with *intent then and there to convert the same to his own use and gain,* the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken, and carried away, etc.

The two objections which are urged to the sufficiency of this indictment are—

First. That it is not charged that the stamps, at the time they were alleged to have been received by Kirby, were the property of the United States; and

Second. That it is not alleged from whom Kirby received them.

It is charged in the first paragraph of the count that certain stamps, the property of the United States, were stolen from a post-office of the United States on the 7th day of June, 1896, by Parley and others; and, following along, it is then charged that on the 9th day of June, 1896, just two days after the theft, Kirby received and had in his possession the postage stamps aforesaid.

Now, what stamps are referred to? What stamps *could* be referred to except the stamps the number, denominations, and values of which are given, and which are specifically alleged to be the property of the United States? There is no other construction to be placed upon the language, and, in fact, the language is plain, direct, and explicit that certain postage stamps, definitely described, the property of the United States, which were stolen from the United States and taken from a post-office of the United States, which is in law the possession of the United States, on the 7th day of June, 1896, were, two days afterwards, to wit, on the 9th day of June, 1896, received by Kirby and had in possession by Kirby, with intent to convert them to his own use and gain, well knowing at the time that the said stamps had theretofore been stolen.

The larceny of these postage stamps by Parley and others did not change the ownership nor deprive the United States of its property in them. The stealing and taking away of the stamps by the thieves only divested the United States of the possession, the right of ownership and the right of property still remaining. Larceny is an offense against the possession. So, then, when it is alleged that these stamps, which are the property of the United States and in the possession of the United States on the 7th day of June, were stolen, and that the plaintiff in error received them on the 9th day of June and had them in his possession on that day, knowing them to have been stolen, unless the larceny of goods takes away the right of property therein these articles were as much the property of the United States on the 9th of June as they were on the 7th.

The charge, therefore, against Kirby is that he did receive and did have in his possession *the postage stamps aforesaid, so as aforesaid feloniously stolen, taken, and carried away.* The "postage stamps aforesaid" were postage stamps, the property of the United States, which were in the possession of the United States in the post-office at Highmore, and which were feloniously taken and carried away from that possession by Parley, Whalen, and King. It seems to me that language could scarcely be found to more explicitly declare that the stamps which were found in Kirby's possession were the property of the United States.

The second objection to the sufficiency of the indictment, as before stated, is that it does not allege from whom Kirby received the property or goods.

If the United States were compelled to rely upon the charge of receiving altogether, there might be room for argument upon this point, and yet the quick succession in which the theft of the postage stamps by Farley, Whalen, and King is committed and the receiving of the stamps by Kirby takes place, precludes the idea that he could have received them from anyone else, and thus, in effect, charges that he received them from the thieves themselves.

It is not, however, settled as a uniform principle of law that in an indictment for receiving stolen goods the name of the person from whom the goods were received must be averred, but the decisions upon this question are very much at variance. In Bishop's New Criminal Procedure, Vol. II, Ch. 53, p. 450, it is laid down that—

> Commonly, in England and in numbers of our States, the indictment does not aver from whom the stolen goods were received,

and the author cites in support of this doctrine, 3 Chitty's Crim. Law, 991; Archbd. Crim. Pl. and Ev., 10th London ed., 269, 19th ed., 472; Archbd. New Crim. Proc., 474; *Jupitz* v. *P.*, 34 Ill., 516; *Cohen* v. *P.*, 5 Par. Cr., 330; *S.* v. *Murphy*, 6 Ala., 845; *C.* v. *Lakeman*, 5 Gray, 82; *Reg.* v. *Goldsmith*, Law Reporter, 2 C. C., 74.

And, further, says Mr. Bishop, in the work above cited,

> This question belongs to a class upon which there may not unreasonably be differences of opinion, and perhaps it may properly be influenced by the terms of the statute. (See p. 450.)

But the United States is not in the position that it is compelled to rely upon this line of reasoning.

The indictment alleges that Kirby received the postage stamps, and also charges

> that Kirby feloniously *did have in his possession*, with intent then and there to convert the same to his own use, etc.

So it is not necessary to take the time of the court in discussing the question as to whether it is required in an indictment drawn under this statute to allege from whom the receiver received the goods, or whether this indictment does, in fact, allege that Kirby received the postage stamps which were found in his possession from Parley, Whalen, and King. The indictment fully charges the other crime—that is, the having in possession the property of the United States which had theretofore been stolen, and with the knowledge that the same had been stolen, with intent to convert the same to his own use and gain.

To constitute this latter offense which is declared by the statute, it is not necessary to allege how or from whom the accused received or came into possession of the property. The offense consists in the fact that the accused has or retains in his possession, with intent to convert to his own use or gain, the property of the United States which has theretofore been stolen and which the accused knows has been stolen.

The count upon which Kirby was tried, as before stated, charges that Parley and others stole certain postage stamps, the property of the United States, from the

post-office at Highmore; it charges further that Kirby, knowing that these identical postage stamps, which were definitely described and valued, were stolen, had them in his possession with intent to convert them to his own use or gain.

It is not necessary to cite authorities to enlighten the court as to the sufficiency of indictments; the court is entirely familiar with these principles; but I may say that certainty is required in criminal pleadings in order to notify the defendant, as well as the court, of the nature of the offense charged, and to enable the defendant to plead any judgment which may be rendered in the case as a bar to a subsequent prosecution for the same offense. When these objects are attained, it is generally sufficient, and there need not be *such categorical certainty as entirely to supersede the necessity of extraneous proof.* Such a degree of certainty would even be impracticable, and has never been, in the enforcement of this rule at common law, required in the highest grades of offenses. There must be such certainty as the subject is reasonably capable of, considering the nature of the offense and character of proof necessary to sustain it. (*Horan* v. *State*, 24 Tex., 161.)

A statement of the act constituting the offense, in plain, concise, and intelligible language, is all that is required, so long as the defendant is not misled, and it is a rule of universal application that when a statute creates an offense and sets out the facts which constitute it the offense may be sufficiently charged in the language of the statute.

It is reasonable to assume that Congress, apprehending the difficulties which would be encountered in many cases in the effort on the part of the prosecution to prove the person from whom stolen property of the United States found in the hands of another had been received by the latter, created the distinct offense of having or retaining stolen goods in possession in order to avoid such difficulties.

This indictment, at least in so far as is necessary to charge the offense of having these postage stamps in possession, contains all that is necessary to meet these requirements.

Although, as I have said before, the decisions as to the necessity of alleging in an indictment for receiving stolen goods the name of the person from whom they are received are not in harmony, there are leading authorities which sustain the sufficiency of the indictment in this case. One case which is directly in point and to which I call the attention of the court is *Com.* v. *Cohen* (120 Mass., 198). The indictment in that case is similar in form and substantially the same as in the case before us. In fact, it would seem that the draftsman of the indictment against the plaintiff in error had the Massachusetts Case before him at the time. The objections by the defendant's counsel involve the same questions as those presented in this case, but the supreme court of Massachusetts, Chief Justice Gray delivering the opinion, held the indictment sufficient.

I refer the court further upon this subject to *Rex* v. *Jervis*, 6 Car. and P., 156 (330). In this case, which

was an indictment for receiving stolen goods knowing them to have been stolen, Tindal, C. J., says:

> The offense created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen.

See also Thomas's Case, 2 East's P. C., 781.

It is true that the indictment against Kirby contains the word "feloniously," but this does not change the character of the offense charged, and this word can either be disregarded or construed to include "unlawfully." (*State* v. *Murphy*, 21 Ind., 441; *Beavers* v. *State*, 58 Ind., 530.)

The indictment concludes "contrary to the form of the statute." This is sufficient to indicate that the act is unlawful, without averring it to have been unlawfully done; so the word "feloniously" may be omitted and the indictment would still be sufficient. (*State* v. *Tibbetts*, 86 Me., 189.)

The second assignment of error, and which plaintiff in error claims also involves a constitutional question, is that he had once been put in jeopardy for the same offense. The facts, as I gather them from the record, on which this point is based, are that previously to the trial and conviction of the plaintiff in error, and during the same term of the court, a trial upon this indictment had been begun and proceeded with, and the case given to the jury; that the jury remained out for some twenty-four hours and were unable to agree; whereupon the court, the jury having made it known to the court that they were unable to agree, found the fact that the jury could

not agree, entered a mistrial, and discharged the jury. The plaintiff in error, by a motion filed in the case (Rec., pp. 16, 17), says that this proceeding was taken in his absence, and that therefore it amounts to an acquittal, or that he has been once in jeopardy for the same offense and can not again be put upon trial.

The record does not show that the plaintiff in error was absent when the proceeding was taken. On the other hand, the only reference to it that I find is on page 17 of the printed record, in the order of the court denying the motion which immediately precedes. I copy the order of the court in full, and it is as follows:

> Motion denied for the reason that the records of this court show that the defendant was once tried on this indictment at the present term, and the jury, after being out twenty-four hours, returned into court and said they were unable to agree upon a verdict, and the court, being of the opinion that said jury could not agree, discharged them from the further consideration of the case, *the defendant being at large on bail.* Defendant excepted to this ruling, and exception allowed.

That the plaintiff in error was not present when this proceeding was taken is a mere inference, and an inference which, I say, is not well founded. The order of the court says: "The defendant being at large on bail." The defendant is at large when he is on bail, and still he might have been present in the court room during the whole proceeding.

So I submit that the record does not show that he was not present. No record of any previous trial in the case is before this court.

But, for the sake of the argument, suppose the court can find enough in the record to conclude that the proceeding, in which the mistrial was entered because of the disagreement of the jury and the jury discharged by the court, was had when the plaintiff in error was not actually present.

I contend that this indictment does not charge a crime of the grade which requires the accused to be present at all stages of the proceeding. The indictment against the plaintiff in error does not charge a felony. The rule, as I understand it, is that unless the offense denounced by the statute is made a felony by the statute, or unless it was a felony at common law and is punished under its common-law name, then it is not a felony, although it may be infamous under that clause of the Constitution which requires it to be tried upon an indictment. (*Bannon and Mulkey* v. *United States*, 156 U. S., 464.)

The offense of receiving stolen goods has not been made a felony by any legislation of Congress; nor has the offense of having in possession stolen goods with intent to convert to one's use or gain been made a felony by any legislation of Congress. The law which authorizes prosecutions for receiving property of the United States which has been stolen, etc., or for having or retaining in possession property of the United States which has been stolen, with intent to convert to one's use or gain, is the second section of the act before copied in this brief. It will be observed that section one of the act denounces the embezzling, stealing, or purloining of the property of the United States as a felony; but section two, under

which this indictment is drawn, simply describes the elements of the offense and prescribes the manner of punishment, and thus the plaintiff in error is charged with an offense which only reaches the grade of a misdemeanor.

Offenses are either felonies or misdemeanors under the laws of the United States, and as offenses against the United States are such as are declared by statute, only such are felonies as are made so by statute. (*Barber* v. *State*, 50 Md., 161; *State* v. *Wheeler*, 3 Vt., 344.)

The offense of receiving stolen goods was not a felony at common law (see Bishop's New Crim. Law, vol. 2, § 1137), and, as before stated, the enactment of a common-law offense into a statutory offense does not change the grade of the offense unless so declared by the statute.

If the position is correct that the indictment against the plaintiff in error charged a misdemeanor, then it was not a constitutional requirement to be present at all stages of the proceeding, and especially is there no constitutional right infringed when the absence of the accused is voluntary and not enforced. The record shows that the plaintiff in error was at large on bail and there was therefore nothing to prevent his being present if he so desired.

In *Hopt* v. *Utah* (110 U. S.), Mr. Justice Harlan, in delivering the opinion of the court, says, on page 578:

> But all doubt upon the subject is removed by the express requirement, not that the defendant may, but, where the indictment is for a *felony*, *must* be "personally present at the trial."

and the same doctrine is reiterated by Mr. Justice Shiras in *Lewis* v. *United States* (146 U. S., 370), that, whilst the rule may be relaxed in misdemeanors, yet in *felonies* the accused must be present during the trial.

The principle declared, therefore, is that in felonies the accused *must* be present at all stages of the trial, yet, in misdemeanors, whilst it is his right to be present, if he is voluntarily absent during the progress of the trial, it does not affect the validity of the proceeding. (See *State* v. *Wheeler*, 3d Vt., 344.)

But if it sufficiently appears that there was a former trial of the plaintiff in error for this offense, and such proceedings were had therein as to entitle him to the benefit of the plea of former conviction, or former acquittal, he has not placed himself in the situation to render such plea available in the case before this court.

The only plea which plaintiff in error entered to the indictment upon which he was tried was the plea of "not guilty." (Rec., p. 7.) This part of the record shows that the plaintiff in error, with his attorney, F. R. Aikens, filed a demurrer to the indictment. The demurrer was overruled by the court and, says the record, "thereupon defendant enters his plea of not guilty to said indictment."

It is true that the plaintiff in error, by his attorneys (Rec., p. 16), moved the court that the action be abated and dismissed on the ground, as stated in substance in the motion filed, that there had been a previous trial of the case, beginning on the 19th of April, 1897, and that on the 22d of April, 1897, and after the case had gone to the jury, the said jury were by the court, in the

absence of the plaintiff in error, and without his knowledge or consent, etc., discharged from the further consideration of the case, and thereby the plaintiff in error was in effect found not guilty; and for this reason, that to place him upon trial again upon this indictment would be to put him a second time in jeopardy, etc.

On this motion, presented as it was, the court very properly denied and refused to dismiss the action. There was no evidence before the court that there had been any former trial except the mere statement of the fact in the written motion filed by the attorneys of the plaintiff in error.

A plea of former acquittal or conviction to be valuable for defense must be pleaded. *State* v. *Morgan*, 95 N. C., 641; *State* v. *Barnes*, 32 Me., 530.)

Much particularity is also required in the form of this plea, and it must be so presented that, upon the face of it, the facts constitute in law a bar. It must show a record of a former conviction or acquittal in a court of competent jurisdiction and must show the identity of the offense. The matter of the record can not be established otherwise than by itself. (*Robbins* v. *Budd*, 2 Ohio, 263; *Rex* v. *Vandercomb*, 2 Leach, 708–711; see also Bishop's New Crim. Proc., Vol. I, Ch. 52, pp. 474–477.)

It is not incumbent upon the prosecution to traverse a plea of former acquittal or conviction, and the burden is on the accused pleading former acquittal or conviction to show that he has been acquitted or convicted of the identical offense for which he is being tried. (*Rickles* v. *State*, 68 Ala., 538; *Vowells* v. *Com.*, 83 Ky., 193.)

The issue joined upon a special plea of a former trial is an issue of fact to be tried by the jury. (*Grant* v. *People*, 4 Park., Cr. Rep. (N. Y.), 527.)

It may be urged that the filing of this written motion, in which it is stated that the plaintiff in error had before been tried and proceedings were had which amounted to an acquittal, put the prosecution upon notice of this defense and that the court ought to have considered it in the light of a plea. This could only be, however, upon the hypothesis that it is the duty of a court before which a criminal trial is progressing, to advise an accused or his attorneys as to the proper method of conducting the defense. There is no such obligation resting on the court.

And then, the written paper which was filed by the attorneys for plaintiff in error as a motion that the action abate or be dismissed is not sufficiently formal, nor does it contain facts sufficient to constitute a proper plea of former acquittal. A plea of former acquittal, to be sufficient, must contain the record and facts which will identify the offense, so that if the jury find the facts to be as stated in the plea, the court can determine as a matter of law that there has been a former acquittal.

And then, upon the plea of former acquittal the accused raises an issue of fact in which the burden of proof is upon him. (Bishop's New Criminal Procedure, vol. 1, sec. 816, p. 478, paragraph 2.)

The record of the former trial must be produced, and it is conclusive for what is provable thereby.

The matter of the record can not be established otherwise than by the record itself, and there must be no

variance between the record and the plea. (Bishop's New Criminal Procedure, vol. 1, sec. 816, paragraph 3, page 478.)

These authorities are all to the end that the formal plea can not be dispensed with; that the same must be filed; must set forth matter sufficient, if true, to constitute in law a bar to the second trial, and that the accused must show a record, such as he describes in his plea, and introduce testimony to identify the offense.

The plaintiff in error has complied with none of these requirements.

Another point which plaintiff in error says involves a constitutional right which was denied him is the challenge to the array of jurors. (Rec., p. 15.)

I do not deem it necessary to take the time of the court in discussing this proposition. I merely call attention to the order (Rec., p. 14), which is as follows:

> *To the clerk of the United States circuit court for said district, and H. J. Davenport, jury commissioner of said district:*
>
> For the purpose of securing a fair and impartial trial of the causes set for trial on the 25th day of May, A. D. 1897, in the above-entitled court, and in pursuance of section 802, R. S. U. S., you are hereby ordered and directed to draw and summon sixty persons from the body of the southern division of the district of South Dakota, excluding the territory within the incorporated limits of the city of Sioux Falls, within the county of Minnehaha and district of South Dakota, and in accordance with the act of Congress defining the manner of drawing jurors approved June 30th, 1879, as amended and modified

by the act of Congress approved November 3d, 1893, to serve as petit jurors at the ensuing adjourned April term, A. D. 1897, of said district court, to be and appear before said district court, to be holden in the rooms used for holding the sessions of the United States courts, in the city of Sioux Falls, in said district, on Tuesday, the 25th day of May, A. D. 1897, at ten o'clock a. m. of said date, and bid them not to depart without leave of court first obtained, and for this purpose it is ordered that a venire issue forthwith after the said drawing shall have taken place and a report thereof duly filed.

By the court:

JOHN E. CARLAND, *Judge.*

Section 802 Revised Statutes reads:

> Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services.

The jury was drawn from the State and district in which the alleged offense was committed, and the district from which it was drawn had been previously ascertained by law. (*Pointer* v. *United States*, 151 U. S., 396, 407.)

The remaining assignment by plaintiff in error, involving a constitutional question, is that the constitutionality of the act of March 3, 1875, is drawn in question, it being the position of plaintiff in error, as stated in his brief—

First, that the charge was based on an unconstitutional statute;

Second, that the essential ingredients of the offense were not attempted to be proven by the witnesses, whom,

it was claimed, had knowledge of those facts, but by record of the trial of the principal felon;

Third, that the statute of March 3, 1875, in so far as it enacts that the judgment against the principal felon shall be conclusive evidence in the prosecution against the receiver that the property had been stolen, is unconstitutional.

The objectionable portion of the statute, as I understand it, is the last paragraph of section 2, which paragraph is as follows:

> And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined.

The plaintiff in error undertakes to raise the question of the constitutionality of the above portion of the act by objections to the introduction as evidence of the several parts of the record of the trial of Parley, Whalen, and King, which were offered by the United States attorney. These objections will be found noted at pages 22 to 28 of the record, inclusive.

The grounds of objection are set out in full on page 23 of the record, at the bottom of the page, and were stated when the United States attorney offered to introduce the indictment against Parley, Whalen, and King, the said objection being as follows:

> That it is incompetent, irrelevant, and immaterial and that it does not conform to the allegations contained in the indictment in the case at bar; and,

> further, for the reason that the act of Congress approved March 3rd, 1875, under which it is sought to introduce this exhibit, as heretofore expressly stated by the defendant, is unconstitutional;

and the same objection was restated as the several parts of the record in the trial of the principal felons were offered in evidence.

It is the latter clause of the objection which is to be considered by the court here, and, unless the point is so presented by the plaintiff in error as to directly draw in question the constitutionality of the act, then the writ of error from the district court to the Supreme Court of the United States does not lie. The fact that testimony admitted by the court is incompetent, irrelevant, or immaterial, or that it does not conform to the allegations contained in the indictment, would be a matter for review by the circuit court of appeals, because a criminal case less than a conviction for a capital felony could not come directly by writ of error from the district court to the Supreme Court upon such question.

The position which I shall urge (and I may say with confidence) is that the proceedings had in the trial, the conditions under which this record was offered, together with the action of the court with reference to this testimony, are such that the constitutionality of the act above referred to is not brought in question.

It will be observed (Rec., p. 21) that O. S. Pendar, clerk of the United States court at Deadwood, S. Dak., was called to the stand by the United States attorney, and by him the record of the trial of Parley, Whalen, and King was identified as the record of the court of

which he was clerk. Then the record of Kirby's trial states—

> Thereupon the prosecution offered in evidence page 23 of the journal of this court, referred to and produced by witness Pendar, as follows:

and throughout the whole course of the introduction by the prosecution of this record, nothing is stated by the United States attorney except that the same is offered in evidence.

When the prosecution had closed its case and rested, the plaintiff in error offered no testimony, but contented himself with a motion to the court (Rec., p. 89) to strike out certain evidence which had been introduced by the prosecution, and he did not include in this motion, as will be seen, a request that the evidence contained in the record of the trial of Parley, Whalen, and King should be stricken out, but, so far as is shown by the record itself, the testimony to which he objected at the close of the trial, and which he desired should be stricken out before the case went to the jury, was a portion of that of the witness Howe, and also of the witness L. S. Tyler and the witness Nicoli, in regard to particular facts set forth in the motion on page 89.

That this record and judgment were not admitted by the court as conclusive of the fact that the property found in possession of the plaintiff in error was stolen, or as conclusive of any other fact, is shown by the charge of the court to the jury (Rec., p. 93), and which upon this point is as follows:

> Now, upon the first proposition—as to whether the property described in the indictment was stolen

as alleged in the indictment—the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons—that is, the parties whom it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, that record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the Government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in coming to a conclusion that the property described in the indictment was actually stolen, as alleged, from the post-office at Highmore. *But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore post-office.*

The judge states unequivocally to the jury that *they must not understand that the record which was introduced proves that the stamps which were found in Kirby's possession were stolen property or that they were the stamps taken from the Highmore post-office.* He also charged the jury that this record only made a *prima facie* case on the part of the Government that the stamps charged in the indictment against Parley, Whalen, and King were stolen property, and that, nothing appearing to the contrary, the jury would be authorized to conclude that the stamps described in the said indictment—that is, the indictment against Parley, Whalen, and King—were stamps which had been stolen from the post-office at Highmore.

So that, under the circumstances, the introduction of this record, at most, is nothing more than a piece of evidence offered by the prosecution, like any other evidence in the case, to go to the jury for their consideration, with other testimony and circumstances tending to show the guilt of the accused.

If the record was incompetent as evidence, and was improperly admitted by the court because of its incompetency upon the exception thereto by the plaintiff in error, he could have the ruling of the court in this respect reviewed by the circuit court of appeals; but the admission of the testimony under such circumstances does not raise the question of the constitutionality of the act of Congress so as to entitle the case to come directly to the Supreme Court. In order that the plaintiff in error could be in position to entitle him to bring his case by writ of error directly from the district court to the Supreme Court in this case, the question of the effect of this record as evidence in the case should have been held by the court below to be conclusive of the fact that the stamps in Kirby's possession were stolen.

The record does not show that it was the purpose of the prosecution in offering this record to prove thereby the fact that the property found in the possession of the plaintiff in error had been stolen, and if this was not the object for which the record was introduced the question of the validity of the act can not arise; and not only that, but, in order to raise the question as to the constitutionality of the act, the record must be offered as evidence of the fact that the property charged in the indictment against the receiver has been stolen and the

court must admit it and hold it as a matter of law to be conclusive of that fact. In other words, the introduction of the judgment, as it is called in the act of Congress, must be accepted by the court as conclusively establishing the fact that the property found in the possession of the receiver has been stolen, without the right or opportunity to the accused to controvert this fact.

I insist that no such condition is presented by the record here.

When the record was offered, the plaintiff in error objected to it on the ground that it was incompetent, irrelevant, and immaterial, and that it did not conform to the allegations contained in the indictment. If this is the view in which he regarded this testimony, and the court overruled his objection, the case could not come to the Supreme Court, but should have gone to the circuit court of appeals.

It is true that the plaintiff in error further suggested that the act of Congress under which it is sought (as he says) to introduce this record is unconstitutional; but the assertion that the prosecuting attorney sought to introduce the record by virtue of any provision of the act of March 3, 1875, is not founded upon any statement of the prosecuting attorney as to how or why he offered the record, nor upon any action of the court as to the grounds upon which or the purposes for which it was admitted.

In order to draw the constitutionality of this statute in question, this record must not only have been introduced as evidence of the fact that the property charged

in the indictment against plaintiff in error had theretofore been stolen from the United States, but as *conclusive evidence* of that fact—that is, when the record was in—the court should have held that the fact that the postage stamps which were found in Kirby's possession were stolen property was proven, and proven conclusively, and that the accused had no right to contradict that fact.

The plaintiff in error could easily have presented the question in its proper form had he elected to do so, and instead of resting his case when the prosecution had closed he could have offered some testimony—one witness would have been sufficient—to prove that the postage stamps which were found in his possession were not stolen property. Then, if the prosecuting attorney had taken the position that this record was conclusive of that fact, and the court had so held, the question would have been raised and presented in proper form to this court.

I do not wish to be understood as taking the position that the courts can uphold an act of Congress which undertakes to make the record or the judgment in the trial of a person convicted of larceny conclusive evidence of the fact that the goods were stolen, in the trial of another indicted for receiving the stolen goods. But there are some authorities which appear to make the record of the conviction of the principal felon competent testimony in the trial of the receiver. In the case of *Rex* v. *Blick* (4 Car. & P., 377), which is a case in which the defendant was indicted for receiving stolen goods, the principal felon having theretofore confessed his guilt upon an indictment charging him with the offense, it was held by Mr. Justice Bosanquet that the

conviction of the principal on his own confession was *prima facie* evidence of his guilt as against the accessory, but not conclusive.

There is another important consideration relating to the admissibility of this record in another view than that it was offered to prove that the postage stamps found in possession of the plaintiff in error were stolen, and that is that it is alleged in the indictment that Parley, Whalen, and King, who broke into the post-office at Highmore on the 7th day of June, 1896, and stole certain property, and among other things certain postage stamps belonging to the United States, had been tried for the offense and convicted.

Now, if this allegation was material, and there has been no suggestion that it was not, then it was competent for the prosecution to introduce evidence to prove it.

Then what was the best evidence to prove that Parley, Whalen, and King had been convicted? Undoubtedly the record of the case in which they were tried.

However, I reassert the position that, in order to avail himself of the point that the act making the judgment of conviction of the principal felon conclusive evidence in this case of the fact that the goods received by or found in the possession of the accused had been stolen, is unconstitutional, the plaintiff in error must have had a decision of the court below upon the point holding that the record introduced by the prosecution was conclusive evidence of that fact.

The plaintiff in error does not come before this court in this situation. On the other hand, he comes here with the only ruling of the court which was made upon the

question directly to the contrary, a ruling in which the court held as a matter of law that the record did not prove that the stamps that were found in Kirby's possession were stolen property or that they were the stamps taken from the Highmore post-office.

I shall not extend this brief to discuss the other exceptions which were taken on the trial and allowed by the court, and which are stated hereinbefore. It is true that if the court here acquires jurisdiction of this case upon any of the constitutional questions involved, it has the power to dispose not only of such constitutional questions, but of the entire case as it may be presented on exceptions allowed during the trial. (*Chappelle* v. *United States*, 160 U. S., 499.) The exceptions, other than those based upon constitutional grounds, as will be seen, are to the admission of testimony under objection by the plaintiff in error and to the refusal of the court to give certain special instructions to the jury requested by the plaintiff in error.

I think the court will see, upon an examination of the several exceptions to the introduction of testimony noted in the record and referred to heretofore by me, that they are not well taken. No error was committed by the presiding judge in his refusal to give the special instructions requested. The charge in respect to these instructions (the court, I think, will see) covers the law.

The plaintiff in error, in his brief, has asserted (brief, p. 21, VII) that—

> If the record of the conviction of the principal felons be laid out of the case, there is then no evidence that the property was "stolen property;"

and further—

> and there is no evidence whatever that it was the property of the United States.

These are very broad assertions when considered in the light of the fact that there is testimony on the part of the prosecution tending to show that the post-office of the United States at Highmore was robbed on the 7th day of June, 1896, by Parley, Whalen, and King; that there was taken therefrom certain property of the United States, among other a large quantity of postage stamps of the United States of various denominations, the whole aggregating about $170 in value, the principal part of which consisted of the value of the stamps; that a man calling himself E. Baxter, which was the alias of Whalen, one of the robbers, shipped by express from Gettysburg, S. Dak., on the 9th day of June, 1896, two days after the robbery of the Highmore post-office, a package weighing 2½ pounds, with the express charges of 35 cents prepaid, to Mr. Joe Kirby at Sioux Falls (see Rec., pp. 60, 61; also, Rec., p. 64); that this package was received by Joe Kirby at Sioux Falls on or about the day of shipment and about two days after the robbery; that the package remained in the possession of Kirby until the 2d day of July, 1896, when it was delivered by him to C. M. Fosness, a post-office inspector, and was found to contain postage stamps of the United States of the value of $126. (See testimony of Fosness, and receipt given for package, Rec., p. 85.)

Aside from the other testimony which tended to prove that these were the stamps which were stolen from the

post-office at Highmore on the 7th of June, and shipped to Kirby by Whalen under his alias of E. Baxter, from Gettysburg, on the 9th, Kirby himself substantially admitted in his conversation with Fosness and Van Buskirk (see Rec., p. 86) that they were the stamps which had been stolen from the said post-office.

It also appears in the testimony that there had been robberies of the post-offices of the United States at Miller and Waubay, in South Dakota, and it will be seen by an examination of the testimony of Fosness (Rec., p. 74) that Kirby had received packages containing stamps stolen from these two offices. (See testimony at bottom of page 74, Record, as to conversation between Fosness and Kirby, in which Kirby admitted having the packages, but declined to open them or disclose their contents.)

Aside from this, the possession of this package of stamps, which were of the character, denomination, and about the aggregate value of those stolen at Highmore, was of itself strong evidence against the plaintiff in error. It may be that the finding in his possession of this character of property was not sufficiently recent after the theft to raise the presumption that he was guilty of larceny; but it is a strong circumstance to be considered by the jury tending to show his guilt of having received stolen property or having in his possession stolen property with a guilty knowledge.

I think I am justified in calling the attention of the court thus far to some of the facts in the case which the testimony of the United States tended to prove, since the plaintiff in error insists that there was no evidence ex-

cept the record of the trial of Parley and others that the stamps found in the possession of plaintiff in error were stolen, or that they were the property of the United States.

JAS. E. BOYD,
Assistant Attorney-General.

KIRBY v. UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

No. 164. Argued January 20, 1899. — Decided April 11, 1899.

On the trial of a person charged with feloniously receiving and having in his possession with intent to convert them to his own use, postage stamps which had been feloniously stolen, taken and carried away from a post office by three persons named, although the person so receiving them well knew that the same had been so feloniously taken, stolen and carried away, the judgment convicting the said three persons of stealing the said stamps was received in evidence against the accused, under the provision in the act of March 3, 1875, c. 144, § 2, that such judgment "shall be conclusive evidence against said receiver, that the property of the United States therein described has been embezzled, stolen or purloined." The accused having been convicted, and the case brought here by writ of error, *Held*, That that provision of the statute violates the clause of the Constitution of the United States, declaring that in all criminal prosecutions, the accused shall be confronted with the witnesses against him; and that the judgment must be reversed.

The contention by the defendant that the indictment is defective in that it does not allege ownership by the United States of the stolen articles of property at the time that they were alleged to have been feloniously received by him, is without merit.

The objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken.

THE case is stated in the opinion of the court.

Mr. A. G. Safford for plaintiff in error. *Mr. C. O. Bailey* and *Mr. Joseph Kirby* were on his brief.

Mr. Assistant Attorney General Boyd for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error Kirby was indicted in the District Court of the United States for the Southern Division of the District of South Dakota under the act of Congress of March 3,

1875, c. 144, entitled "An act to punish certain larcenies, and the receivers of stolen goods." 18 Stat. 479.

The first section provides that "any person who shall embezzle, steal or purloin any money, property, record, voucher or valuable thing whatever of the moneys, goods, chattels, records or property of the United States shall be deemed guilty of felony, and on conviction thereof before the District or Circuit Court of the United States in the district wherein said offence may have been committed, or into which he shall carry or have in possession said property so embezzled, stolen or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

By the second section it is provided that "if any person shall receive, conceal or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher or valuable thing whatever, of the moneys, goods, chattels, records or property of the United States, which has theretofore been embezzled, stolen or purloined, such person shall, on conviction before the Circuit or District Court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; and such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen or purloined." 18 Stat. 479.

The indictment contained three counts, but the defendant was tried only on the first. In that count it was stated that Thomas J. Wallace, Ed. Baxter and Frank King on the 7th day of June, 1896, at Highmore, within the jurisdiction of the court, feloniously and forcibly broke into a post office of the United States, and feloniously stole, took and carried away

therefrom certain moneys and property of the United States, to wit: 3750 postage stamps of the denomination of two cents and of the value of two cents each, 1266 postage stamps of the denomination of one cent and of the value of one cent each, 140 postage stamps of the denomination of four cents and of value of four cents each, 250 postage stamps of the denomination of five cents and of the value of five cents each, 80 postage stamps of the denomination of eight cents and of the value of eight cents each, and also United States Treasury notes, national bank notes, silver certificates, gold certificates, silver, nickel and copper coins of the United States as well as current money of the United States, a more particular description of which the grand jury were unable to ascertain, of the value of $58.19; and that the persons above named were severally indicted and convicted of that offence, and had been duly sentenced upon such conviction.

It was then alleged that the defendant on the 9th day of June, 1896, at the city of Sioux Falls, the postage stamps "so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use and gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken and carried away, contrary to the form, force and effect of the statutes of the United States in such cases made and provided and against the peace and dignity of the United States."

At the trial of Kirby the Government offered in evidence a part of the record of the trial of Wallace, Baxter and King, from which it appeared that Wallace and Baxter after severally pleading not guilty withdrew their respective pleas and each pleaded guilty and was sentenced to confinement in the penitentiary at hard labor for the term of four years. It appeared from the same record that King having pleaded not guilty was found guilty and sentenced to the penitentiary at hard labor for the term of five years.

The admission in evidence of the record of the conviction of Wallace, Baxter and King was objected to upon the ground that the above act of March 3, 1875, was unconstitutional so

far as it made that conviction conclusive evidence in the prosecution of the receiver that the property of the United States described in the indictment against him had been embezzled, stolen or purloined. The objection was overruled, and the record offered was admitted in evidence, with exceptions to the accused.

After referring to the provisions of the act of March 3, 1875, and to the indictment against Kirby, the court among other things said, in its charge to the jury: "In order to make out the case of the prosecution and in order that you should be authorized to return a verdict of guilty in this case, you must find beyond a reasonable doubt from the evidence in the case certain propositions to be true. In the first place it must be found by you beyond a reasonable doubt that the property described in the indictment, and which is also described in the indictment against these three men [Wallace, Baxter and King] who it is alleged have been convicted, was actually stolen from the post office at Highmore, was the property of the United States and of a certain value. Second. You must find beyond a reasonable doubt that the defendant Joseph Kirby received or had in his possession a portion of that property which had been stolen from the post office at Highmore. Third. That he received or had it in his possession with intent to convert it to his own use and gain. Now, upon the first proposition — as to whether the property described in the indictment was stolen as alleged in the indictment — the prosecution has introduced in evidence the record of the trial and conviction of what are known as the principal felons — that is, the parties who it is alleged committed the larceny. Now, in the absence of any evidence to the contrary, the record is sufficient proof in this case upon which you would be authorized to find that the property alleged in that indictment was stolen as alleged; in other words, it makes a *prima facie* case on the part of the Government which must stand as sufficient proof of the fact until some evidence is introduced showing the contrary, and, there being no such evidence in this case, you will, no doubt, have no trouble in coming to a conclusion that the property

described in the indictment was actually stolen, as alleged, from the post office at Highmore. But I don't want you to understand me to say that that record proves that the stamps that were found in Kirby's possession were stolen property, or that they were the stamps taken from the Highmore post office. Upon the further proposition that the court has suggested, after you have found, by a careful consideration of all the evidence, beyond a reasonable doubt, that the property alleged in the indictment was stolen, then you will proceed to consider whether or not the defendant ever at any time, either on the date alleged in the indictment or any other date within three years previous to the finding of the indictment, had in his possession or received any of this property which was stolen from the post office at Highmore. Now, in order to find the defendant guilty of the offence charged in the indictment, you would have to find beyond a reasonable doubt from all the evidence that he either actually received a portion or all of the property which was stolen from the post office at Highmore, and that he received that property from the thief or thieves who committed the theft at the Highmore post office or some agent of these thieves. The statute punishes, you will observe, both the receipt of stolen property, knowing it to have been stolen, with the intent described in the statute, and also the having in the possession such property, knowing it to have been stolen, with the intent to convert it to the person's own use or gain. If you find beyond a reasonable doubt that any of the property which was stolen at the post office at Highmore was actually received or had in the possession of the defendant, then you cannot convict unless you further find that the defendant had the property in his possession or received it from the thief or his agent, knowing at the time that it was stolen property. Now, upon the question of whether the defendant knew that it was stolen property, you will, of course, consider all the evidence in the case. You have the right to find that the person or the defendant knew that it was stolen property from the admissions he may have made, if he made any, if there is such evidence in the case, or from other circumstances that you would have the right to infer

that he did know. Now, if a person received property under such circumstances that would satisfy a man of ordinary intelligence that it was stolen property, and you further find beyond a reasonable doubt that he actually did believe it was stolen property, then you have a right to infer and find that at the time of the receipt of the property the person knew that it was stolen. Now, the next point in the case is in regard to the intent the defendant had in regard to the use or disposal of the property. The statute requires that this receipt of stolen property, knowing it to have been stolen, must also be with the intent to convert it to the use of the party in whose possession it is found. There are statutes which simply punish the knowingly receiving stolen property. That was the common law. But this statute has added this further ingredient that it must be done with the intent to convert it to the party's own use and gain. It was probably put in for the reason that the statute goes further than the common law, making it punishable to conceal or aid in concealing with intent to convert it to his own use and gain. Now, all these propositions that I have charged must be made out by the prosecution, of course, beyond a reasonable doubt, and in case you have a reasonable doubt of any of these ingredients, it will be your duty to acquit the defendant."

In response to a request from the jury to be further instructed, the court after referring to the indictment and to the second section of the act of 1875, said: "This indictment does not contain all the words of the statute. This indictment charges the defendant with having, on the 9th day of June, 1896, received and had in his possession these postage stamps that were stolen from the United States at Highmore. Now, if you should find beyond a reasonable doubt from all the testimony in the case, in the first place, that the postage stamps mentioned in the indictment or any of them were stolen from the post office at Highmore by these parties who it is alleged did steal them, and you further find beyond a reasonable doubt that these postage stamps or any portion of them were on the 9th day of June, 1896, received by the defendant from the thieves or their agent, knowing the same to have

been so stolen from the United States by these parties, with the intent to convert the same to his own use and gain, or if you find beyond a reasonable doubt that they were so stolen at the Highmore post office, as I have stated, and that the defendant, on or about the 9th day of June had them in his possession or any portion of them, knowing the same to have been so stolen, with the intent to convert the same to his own use and gain, and you will find all these facts beyond a reasonable doubt, you would be authorized to return a verdict of guilty as charged."

The jury returned a verdict of guilty against Kirby. The exceptions taken by him at the trial were sufficient to raise the questions that will presently be considered.

As shown by the above statement the charge against Kirby was that on a named day he feloniously received and had in his possession with intent to convert to his own use and gain certain personal property of the United States, theretofore feloniously stolen, taken and carried away by Wallace, Baxter and King, who had been indicted and convicted of the offence alleged to have been committed by them.

Notwithstanding the conviction of Wallace, Baxter and King, it was incumbent upon the Government, in order to sustain its charge against Kirby, to establish beyond reasonable doubt (1) that the property described in the indictment was in fact stolen from the United States; (2) that the defendant received or retained it in his possession, with intent to convert it to his own use or gain; and (3) that he received or retained it with knowledge that it had been stolen from the United States.

How did the Government attempt to prove the essential fact that the property was stolen from the United States? In no other way than by the production of a record showing the conviction under a separate indictment of Wallace, Baxter and King — the judgments against Wallace and Baxter resting wholly upon their respective pleas of guilty, while the judgment against King rested upon a trial and verdict of guilty. With the record of those convictions out of the present case,

there was no evidence whatever to show that the property alleged to have been received by Kirby was stolen from the United States.

We are of the opinion that the trial court erred in admitting in evidence the record of the convictions of Wallace, Baxter and King, and then in its charge saying that in the absence of proof to the contrary, the fact that the property was stolen from the United States was sufficiently established against Kirby by the mere production of the record showing the conviction of the principal felons. Where the statute makes the conviction of the principal thief a condition precedent to the trial and punishment of a receiver of the stolen property, the record of the trial of the former would be evidence in the prosecution against the receiver to show that the principal felon had been convicted; for a fact of that nature could only be established by a record. The record of the conviction of the principals could not however be used to establish, against the alleged receiver, charged with the commission of another and substantive crime, the essential fact that the property alleged to have been feloniously received by him was actually stolen from the United States. Kirby was not present when Wallace and Baxter confessed their crime by pleas of guilty, nor when King was proved to be guilty by witnesses who personally testified before the jury. Nor was Kirby entitled of right to participate in the trial of the principal felons. If present at that trial he would not have been permitted to examine Wallace and Baxter upon their pleas of guilty, nor cross-examine the witnesses introduced against King, nor introduce witnesses to prove that they were not in fact guilty of the offence charged against them. If he had sought to do either of those things — even upon the ground that the conviction of the principal felons might be taken as establishing *prima facie* a vital fact in the separate prosecution against himself as the receiver of the property — the court would have informed him that he was not being tried and could not be permitted in anywise to interfere with the trial of the principal felons. And yet the court below instructed the jury that the conviction of the principal felons upon an indictment

against them alone was sufficient *prima facie* to show, as against Kirby, indicted for another offence, the existence of the fact that the property was stolen — a fact which, it is conceded, the United States was bound to establish beyond a reasonable doubt in order to obtain a verdict of guilty against him.

One of the fundamental guarantees of life and liberty is found in the Sixth Amendment of the Constitution of the United States, which provides that "in all criminal prosecutions the accused shall . . . be confronted with the witnesses against him." Instead of confronting Kirby with witnesses to establish the vital fact that the property alleged to have been received by him had been stolen from the United States, he was confronted only with the record of another criminal prosecution, with which he had no connection and the evidence in which was not given in his presence. The record showing the result of the trial of the principal felons was undoubtedly evidence, as against *them*, in respect of every fact essential to show *their* guilt. But a fact which can be primarily established only by witnesses cannot be proved against an accused — charged with a different offence for which he may be convicted without reference to the principal offender — except by witnesses who confront him at the trial, upon whom he can look while being tried, whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases. The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. "This presumption," this court has said, "is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created." *Coffin* v. *United States*, 156 U. S. 432, 459. But that presumption in *Kirby's case* was in effect held in the court below to be of no consequence; for, as to a vital fact which the Government was bound to establish affirma-

tively, he was put upon the defensive almost from the outset of the trial by reason alone of what appeared to have been *said* in another criminal prosecution with which he was not connected and at which he was not entitled to be represented. In other words, the United States having secured the conviction of Wallace, Baxter and King as principal felons, the defendant charged by a separate indictment with a different crime — that of receiving the property in question with knowledge that it was so stolen and with intent to convert it to his own use or gain — was held to be presumptively or *prima facie* guilty so far as the vital fact of the property having been stolen was concerned, as soon as the Government produced the record of such conviction and without its making any proof whatever by witnesses confronting the accused of the existence of such vital fact. We cannot assent to this view. We could not do so without conceding the power of the legislature, when prescribing the effect as evidence of the records and proceedings of courts, to impair the very substance of a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union.

This precise question has never been before this court, and we are not aware of any adjudged case which is in all respects like the present one. But there are adjudications which proceed upon grounds that point to the conclusion reached by us.

A leading case is *Rex* v. *Turner*, 1 Moody's Crown Cases, 347. In that case the prisoner was indicted for feloniously receiving from one Sarah Rich certain goods and chattels theretofore feloniously stolen by her from one Martha Clarke. At the trial before Mr. Justice Patteson it was proposed to prove a confession of Sarah Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner and others as well as herself. The evidence was not admitted, but the court admitted other evidence of what Sarah Rich said

respecting herself only. The prisoner was convicted and sentenced. The report of the case proceeds: "Having since learned that a case occurred before Mr. Baron Wood at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver, the learned judge thought it right to submit to the learned judges the question, Whether he was right in admitting the confession of Sarah Rich in the present case. The learned judge thought it right to add that the prisoner, one Taylor, and Sarah Rich had immediately before been tried upon an indictment for burglary, and stealing other property in the house of Mrs. Clarke on the night of the 22d of August; and that Taylor and Rich had been found guilty, but the prisoner had been acquitted, there being no proof of his presence. The learned judge did not pass sentence upon Sarah Rich immediately; but a new jury was called, and the prisoner was tried as a receiver, so that either party might have called her as a witness. In Easter term, 1832, all the judges (except Lord Lyndhurst, C. B., and Taunton, J.) met, and having considered this case, were unanimously of opinion that Sarah Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Sarah Rich been convicted, and the indictment against the prisoner stated, not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means; and the conviction was held wrong." In a later case, *Keable* v. *Payne*, 8 Ad. & Ell. 555, 560, which was an action involving a question as to the admission of certain evidence, and was heard in the Queen's Bench before Lord Denman, Chief Justice, and Littledale, Patteson and Williams, Justices, Mr. Justice Patteson, referring to *Rex* v. *Turner*, above cited, said: "On an indictment for receiving goods feloniously taken, the felony must be proved; and neither a judgment against a felon, nor his admission, would be evidence against the receiver. In such a case I

once admitted evidence of a plea of guilty by the taker; and it was held that I did wrong." A note in Starkie on Evidence p. 367, is to this effect: "In *R.* v. *Turner*, 1 Moo. C. C. 347; *R.* v. *Ratcliffe*, 1 Lew. C. C. 112; *Keable* v. *Payne*, 8 Ad. & E. 560, (35 E. C. L. R. 454,) it is stated that many of the judges (all the judges except two being assembled) were of opinion that the record of the conviction of the principal would not be evidence of the fact, where the indictment against the accessory alleged not the conviction but the guilt of the principal. And on principle it would seem to be evidence only when the indictment alleges the conviction of the principal, and *simply to support that allegation.*"

The leading American case on the question is *Commonwealth* v. *Elisha*, 3 Gray, 460. The indictment was for receiving stolen goods knowing them to have been stolen. The court, speaking by Metcalf, J., said: "This indictment is against the defendant alone, and charges him with having received property stolen by Joseph Elisha and William Gigger, knowing it to have been stolen. It is not averred, nor was it necessary to aver or prove, (Rev. Sts. c. 126, § 24,) that they had been convicted of the theft. But it was necessary to prove their guilt, in order to convict the defendant. Was the record of their conviction on another indictment against them only, upon their several pleas of guilty to a charge of stealing the property, legal evidence, against the defendant, that they did steal it? We think not, either on principle or authority. That conviction was *res inter alios.* The defendant was not a party to the proceedings, and had no opportunity nor right to be heard on the trial. And it is an elementary principle of justice, that one man shall not be affected by another's act or admission, to which he is a stranger. That conviction being also on the confession of the parties, the adjudged cases show that it is not evidence against the defendant. *Rex* v. *Turner*, 1 Mood. C. C. 347, and 1 Lewin's C. C. 119; 1 Greenl. Ev. § 233; Rosc. Crim. Ev. (2d ed.) 50; *The State* v. *Newport*, 4 Harring. (Del.) 567. We express no opinion concerning a case differing in any particular from this, but confine ourselves to the exact

question presented by these exceptions. Our decision is this, and no more: The record of the conviction of a thief, on his plea of guilty to an indictment against him alone for stealing certain property, is not admissible in evidence to prove the theft, on the trial of the receiver of that property, upon an indictment against him alone, which does not aver that the thief has been convicted."

To the same general effect are some of the text-writers. Phillips, in his Treatise on the Law of Evidence, referring to the rule as to the admissibility and effect of verdicts or judgments in prosecutions, says: "A record of conviction of a principal in felony has been admitted in some cases, not of modern date, as evidence against the accessory. *R.* v. *Smith*, Leach Cr. C. 288; *R.* v. *Baldwin*, 3 Camp. 265. This has been supported on the ground of convenience, because the witnesses against the principal might be dead or not to be found, and on the presumption that the proceedings must be taken to be regular, and the guilt of the convicted party to be established. Fost. Disc. iii. c. 2, s. 2, p. 364. But this is not strictly in accordance with the principle respecting the admissibility of verdicts as evidence against third persons. From the report of the recent case of *Rex* v. *Turner*, it seems that a record of conviction of a principal in the crime of stealing, who pleads guilty, would not now be received as evidence of the guilt of the principal against the receivers of the stolen property, or the accessory after the fact; and it is said to be doubtful, whether a record of the conviction of the principal on his plea of not guilty, would be admissible against the accessory. As proof of *the fact of conviction*, the record would be admissible and conclusive, but it seems not to be admissible evidence of the *guilt* of the convict, as against another person charged with being connected with him in crime, the record being in this respect *res inter alios acta*. It is evidence that a certain person, named in the record, was convicted by the jury, but not evidence as against a third person, supposed to have been engaged with him in a particular transaction, as to the *ground* on which the conviction proceeded, namely, that the convict committed the criminal act described in the record."

2 Phillips's Ev. 3d ed. pp. 22-3. Taylor in his Treatise on Evidence, after stating that a prisoner is not liable to be affected by the confessions of his accomplices, says: "So strictly has this rule been enforced, that where a person was indicted for receiving stolen goods, a confession by the principal that he was guilty of the theft, was held by all the judges to be no evidence of that fact as against the receiver (*R.* v. *Turner*); and the decision, it seems, would be the same, if both parties were indicted together, and the principal were to plead guilty. (*Id.*)" 1 Taylor's Ev. § 826, 6th ed.

The principle to be deduced from these authorities is in harmony with the view that one accused of having received stolen goods with intent to convert them to his own use, knowing at the time that they were stolen, is not within the meaning of the Constitution confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel. As heretofore stated the crime charged against Wallace, Baxter and King and the crime charged against Kirby were wholly distinct — none the less so because in each case it was essential that the Government should prove that the property described was actually stolen. The record of the proof of a vital fact in one prosecution could not be taken as proof in the other of the existence of the same fact. The difficulty was not met when the trial court failed as required by the act of 1875 to instruct the jury that the record of the conviction of the principal felons was conclusive evidence of the fact that the property had been actually stolen, but merely said that such record made a *prima facie* case as to such fact. The fundamental error in the trial below was to admit in evidence the record of the conviction of the principal felons as competent proof for any purpose. That those persons had been convicted was a fact not necessary to be established in the case against the alleged receiver; for, under the statute, he could be prosecuted even if the principal felons had not been tried or indicted. As already stated, the effect of the charge was

to enable the Government to put the accused, although shielded by the presumption of innocence, upon the defensive as to a vital fact involved in the charge against him by simply producing the record of the conviction of other parties of a wholly different offence with which the accused had no connection.

It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon oath — "the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth." *Clyde Mattox* v. *United States*, 146 U. S. 140, 151; Cooley's Const. Lim. 318; 1 Phillips on Ev. c. 7, § 6.

For the reasons stated it must be held that so much of the above act of March 3, 1875, as declares that the judgment of conviction against the principal felons shall be evidence in the prosecution against the receiver that the property of the United States alleged to have been embezzled, stolen or purloined had been embezzled, stolen or purloined, is in violation of the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him. Upon this ground the judgment must be reversed and a new trial had in accordance with law. But as the case must go back to the Circuit Court for another trial, it is proper to notice other questions presented by the assignments of error.

The accused contends that the indictment is defective in that it does not allege ownership by the United States of the stolen articles of property at the time they were alleged to have been feloniously received by him. This contention is without merit. The indictment alleges that the articles

described were the property of the United States when they were feloniously stolen on the 7th day of June, 1896, and that the defendant only two days thereafter, on the 9th day of June, 1896, "the postage stamps aforesaid so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have in his possession, with intent then and there to convert the same to his own use or gain, the said Joe Kirby then and there well knowing the said postage stamps to have been theretofore feloniously stolen, taken and carried away." The stamps alleged to have been feloniously received by the accused on the 9th day of June are thus alleged to have been the same that were stolen from the United States two days previously. The larceny did not change the ownership, and it must be taken that the United States had not regained possession of the stamps before they were received by Kirby, and that the indictment charges that they were out of the possession of the United States and stolen property when they came to the hands of the accused.

Another contention by the accused is that the indictment was fatally defective in not stating from whom the defendant received the stamps. This contention is apparently supported by some adjudications, as in *State* v. *Ives*, 13 Iredell, 338. But upon a careful reading of the opinion in that case it will be found that the judgment rests upon the ground that the statute of North Carolina, taken from an old English statute, made the receiver of stolen goods strictly an accessory and contemplated the case of the goods being received from the person who stole them. As already stated the act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony, for which he can be tried either before or after the conviction of the principal felon, or whether the latter is tried or not. Under such a statute the person who stole the property might be pardoned, and yet the receiver could be indicted and convicted of the crime committed by him. Bishop in his New Criminal Procedure says that while some American cases have held it to be

necessary in an indictment against the receiver of stolen goods to state from whom he received the goods, "commonly, in England and in numbers of our States, the indictment does not aver from whom the stolen goods were received." Vol. 2, § 983. By an English statute, 7 & 8 Geo. IV, June 21, 1827, c. 29, § 54, it was enacted that "if any person shall receive any chattel, money, valuable security or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice," etc. Under that statute a receiver of stolen goods was indicted. It was objected that one of the counts did not state the name of the principal, or that he was unknown. Tindall, C. J., said: "It will do. The offence created by the act of Parliament is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen. The question therefore will be, whether the goods are stolen, and whether the prisoner received them knowing them to have been stolen. Your objection is founded on the too particular form of the indictment. The statute makes the receiving of goods, knowing them to have been stolen, the offence." *Rex* v. *Jervis*, 6 C. & P. 156; 2 Russell on Crimes, 6th ed. 436. In *State* v. *Hazard*, 2 R. I. 474, an indictment charging the accused with fraudulently receiving stolen goods, knowing them to have been stolen, was held to be good, although it did not set forth the name of any person from whom the goods were received, nor that they were received from some person or persons unknown to the grand jurors. We therefore think that the objection that the indictment does not show from whom the accused received the stamps, nor state that the name of such person was unknown to the grand jurors, is not well taken. If the stamps were in fact stolen from the United States, and if they were received by the

accused, no matter from whom, with the intent to convert them to his own use or gain, and knowing that they had been stolen from the United States, he could be found guilty of the crime charged even if it were not shown by the evidence from whom he received the stamps. This rule cannot work injustice nor deprive the accused of any substantial right. If it appears at the trial to be essential in the preparation of his defence that he should know the name of the person from whom the Government expected to prove that he received the stolen property, it would be in the power of the court to require the prosecution to give a bill of particulars. *Coffin* v. *United States*, 156 U. S. 432, 452; *Rosen* v. *United States*, 161 U. S. 29, 35; *Commonwealth* v. *Giles*, 1 Gray, 466; Rosc. Crim. Ev. 6th ed. 178, 179, 420.

The judgment is reversed, and the case is remanded with directions for a new trial and for further proceedings consistent with law.

MR. JUSTICE BROWN and MR. JUSTICE MCKENNA dissented.

MR. JUSTICE BREWER did not participate in the decision of this case.